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No. 580.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1906.

THE UNITED STATES,
Appellants,

vs.

CONRAD HEINSZEN and GUSTAV BROCKMANN, Trading as partners under the firm name of C. HEINSZEN & Co.,
Appellees.

APPEAL FROM A JUDGMENT OF THE COURT OF CLAIMS.

BRIEF FOR APPELLEES.

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CONRAD HEINSZEN and GUSTAV BROCTMANN, trading as partners under the firm name of C. Heinszen & Co.,
Appellees.

BRIEF FOR APPELLEES.

Statement.

This is an appeal from a judgment of the Court of Claims in favor of the appellees for the sum of $16,827.31 (R., p., 83), the amount of moneys exacted from the claimants as a military contribution under the guise of customs duties, at the port of Manila, Philippine Islands, by the military authorities under the assumed authority of the order of the President of July 12, 1898, but without warrant of law, upon goods shipped from the United States between April 11th, 1899, the date of the ratification of the treaty with Spain and November 15th, 1901, the date when the tariff enacted by the Philippine Commission took effect.

The petition was filed in the Court of Claims July 1, 1902 (R., p., 1), and an amended petition (which differed from the original in substance, only in that the items and amounts so exacted were correctly stated (Rp. 6–12) on August 20, 1906. The United States demurred to the amended petition (R., p., 12). The Court of Claims after the submission of the case on argument and briefs rendered an opinion overruling the demurrer with leave to plead ; the United States then filed a general traverse, and the case was submitted upon an agreed statement of facts which the Court adopted as its findings of facts (R., pp. 21–24). The facts so found embodied the allegations of the petition, and the Court, without further argument, directed judgment for the amount claimed (R., p. 83). The case is now before this Court on appeal from that judgment.

The facts so found by the Court of Claims are substantially identical with those found by it in the *Warner Barnes* case, and the facts alleged in the petition and admitted by the demurrer in the *Lincoln* case. Those cases were elaborately argued at the October Term, 1904, and decided by the unanimous opinion of the Court, written by Mr. Justice HOLMES, April 3d, 1905 (*Lincoln* and *Warner Barnes & Co., Ltd. vs. United States,* 197 U. S.,419).

Upon the petition of the Attorney-General, in which *it was stated that those were test cases involving similar claims for several mlllions of dollars then pending in the Court of Claims,* a reargument was ordered upon the question of ratification by Congress of the exactions in question.

Reargument was had in January, 1906, both Mr. Attorney-General Moody and Mr. Solicitor-General Hoyt presenting the case for the United States. On May 28th, 1906, this Court rendered its opinion, written by the Chief Justice, adhering to the conclusion previously announced, Mr. Justices WHITE and MCKENNA dissenting (202 U. S., 484). Motion was then made by the attorney for the claimants that the mandate issue forthwith, and, at the suggestion of the

Attorney-General, the Clerk was directed to issue the mandate as soon as the Attorney-General should have read the opinion, and so notified the Clerk. No such notice having been received by the Clerk, and on the 6th of June, 1906, a bill having been introduced in the Senate (No. 6362, 59th Congress first session, a copy of which is printed as Appendix A to this brief), by which all duties collected in the Philippines were in terms ratified " as fully in all respects as if the same had been expressly authorized by an Act of Congress before their levy and collection " (with a proviso that the act should not apply to suits already determined by the Supreme Court), application was made to the Clerk to issue the mandate. This application was granted and the mandate issued accordingly on June 8th, 1906. On the same day judgment was entered on the mandate in the Court of claims in the Warner Barnes case for $71,161.95 and on June 27th, this judgment was reported to Congress by the Secretary of the Treasury for appropriation, but with certain comments upon the merits of the claim. This report is printed as Senate Document 507 and we annex a copy as Exhibit B.

On June 26th the House Committee on Appropriations reported an amendment to the General Deficiency Bill embodying the substance of the Senate Bill 6362. After an earnest debate on the power of Congress so to ratify the exaction of moneys under the guise of customs duties after this Court had held that the exaction was utterly without warrant of law and that claimants were entitled to recover their moneys so exacted, and the presentation to Congress of a letter from the Secretary of War to Mr. Crumpacker, of Indiana, accompanied by *a letter from the Attorney General* in which he stated that he agreed " with the statement of the case made by the Secretary of War," this amendment was adopted by the House.

These letters are printed at pages 9671–2 of the Congressional Record and we have appended copies (Appendices C and D).

In the Senate an argument in opposition to the bill was made by the senior Senator from Alabama upon a motion to amend the bill by striking out the ratification and with the permission of the Senate he had inserted in the Record a statement and brief prepared by counsel for the claimants (Cong. Record, pp. 9769–9776). The only reply to this argument was a motion to lay the amendment on the table which was adopted.

The bill was then passed and on June 30th signed by the President.

In his brief in the Court of Claims in the case at bar, Mr. Assistant Attorney General Van Orsdel states that the questions raised in behalf of the United States were :

(1) Has suit been instituted against the proper parties ?

(2) Has a case of duress against the defendants been made out by the allegations of the petition ?

(3) Has the right of the claimant to recover been barred by failure to protest ?

(4) Has the validating act of June 30, 1906, legalized the collection of duties complained of ?

We understand that in this Court the argument will be confined to two points :

1. Do the findings of fact of the Court of Claims support the conclusion that the payment of the moneys sought to be recovered was involuntary ?

2. Is the Ratification Act of June 30th, 1906, within the power of Congress ?

In the Court of Claims counsel for the claimants took the position that all these questions had been decided adversely to the Government by this Court in *DeLima vs. Bidwell*, 182 U. S., 1 ; *Dooley vs. United States*, 182 U. S., 222 ; *Lincoln and Warner Barnes & Co., Ltd., vs. United States*, 197 U. S., 419 ; 202 U. S., 484.

The Court of Claims in a most able and exhaustive opinion by Judge BARNEY (R., pp. 13-20), held, unanimously : *(a)* that in view of the decisions cited, the questions of procedure, voluntary payment and con-

stitutionality of the ratifying act were not open; *(b)* that considering the question of the power of Congress as an open one, the weight of authority was that "retrospective statutes are valid only to the extent of curing such defects as are in the nature of irregularities, and cannot extend to matters of jurisdiction" (R., p. 20), and that consequently the attempted ratification was unconstitutional and void, and the case, therefore, completely within the decision of this Court in *Lincoln-Warner Barnes vs. United States.*

In view, therefore, of the very elaborate and exhaustive arguments and briefs which have been submitted so recently to this Court in those cases covering completely the two points now again urged in behalf of the United States, and of the express language of this Court in the opinions referred to, we divide this brief into two sections;

The first, under points first and second, that in spite of the fact that the Act of June 30, 1906, was passed since the decision of this Court in the *Lincoln-Warner Barnes case*, the questions now submitted are finally settled by the decisions of this Court in *DeLima vs. Bidwell*, *Dooley vs. United States*, and *Lincoln vs. United States;*

The second, under points third to sixth, that regarding both of these questions as still open, yet the payment was involuntary, and the attempted ratification violates the Constitution.

FIRST POINT.

THE DECISIONS OF THIS COURT IN DE LIMA VS. BIDWELL, DOOLEY VS. UNITED STATES AND LINCOLN, WARNER BARNES VS. UNITED STATES HOLD THAT CONGRESS HAS NOT THE POWER TO RATIFY THE COLLECTION OF MONEYS EXACTED WITHOUT WARRANT OF LAW UNDER THE CIRCUMSTANCES DISCLOSED BY THE RECORD NOW BEFORE THE COURT.

The question as to the power of Congress to ratify the illegal exaction of moneys after suit brought for their recovery, was squarely presented to and decided by this Court in *De Lima vs. Bidwell*, 182 U. S., 1, 199, 200. The amounts involved in that case were exacted from the plaintiff by the Collector of Customs at the port of New York upon sugars imported from Porto Rico in November, 1899.

The action was begun against the Collector on March 13, 1900. On March 24, 1900, Congress passed an act, 31 Stat., 51 (2 Supp. R. S., 1125), which provided that the sum of $2,095,455.88,

> " being the amount of customs revenue *received on*
> " *importations by the United States from Porto*
> " *Rico* * * * to the first of January, 1900,
> " *together with any further Customs revenue col-*
> " *lected on importations from Porto Rico since the*
> " *1st of January, 1900, or that shall hereafter be*
> " *collected under existing law* shall be placed at
> " the disposal of the President to be used for the
> " government of Porto Rico ; * * * and the
> " revenues herein referred to, *already collected*
> " and to be collected under existing law, *are hereby*
> " *appropriated for the purposes herein specified* out
> " of any moneys in the Treasury not otherwise
> " appropriated."

It was insisted upon the argument that this act ratified the collection of the duties involved and *this ques-*

tion went to the root of the plaintiff's right to maintain his action. This Court expressly decided that an act of ratification could

> " clearly have no retroactive effect as to moneys
> " theretofore paid under protest for which an
> " action to recover back had already been brought.
> " As the action in this case was brought March
> " 13, 1900, eleven days before the Act was passed,
> " *the right to recover the money sued for could not*
> " *be taken away by a subsequent Act of Congress.*
> " Plaintiffs sue in assumpsit for *money which the*
> " *Collector has in his hands, justly and equitably*
> " *belonging to them.* To say that Congress could
> " by a subsequent act deprive them of the right
> " to prosecute this action, *would be beyond its*
> " *power.* In any event, it should not be inter-
> " preted so as to make it retroactive. *Kennett's*
> " *Petition*, 24 N. H., 139; *Alter's Appeal*, 67
> " Penn. St., 342; *Norman vs. Heist*, 5 W. & S.,
> " 171; *Donovan vs. Pitcher*, 53 Ala., 411; *Pala-*
> " *ret's Appeal*, 67 Penn. St., 479; *State vs. Warren*,
> " 28 Md., 338" (182 U. S., 199-200).

An examination of the cases cited shows that they are all authorities for the proposition that the Legislature cannot by retroactive laws impair vested rights without violating the provision common to both State and Federal Constitutions,—that no man shall be deprived of his property without due process of law. These cases deal not with questions of irregular or informal assessments, but with laws confiscatory in their nature and leave no doubt as to the precise meaning of this Court in the language quoted.

Far from being, as stated by the Secretary of War in his letter to Mr. Crumpacker (Appendix D, *post* p.) "an *obiter dictum* by Justice BROWN," this was a decision of this Court upon a point directly in issue. Obviously if Congress had the power to ratify the collection of duties after suit brought, the judgment in

DeLima vs. Bidwell must have been for the defendant, and we submit that the language of the Act of March 12th, 1900, is a clear ratification of the collection of the duties on imports from Porto Rico, in that it appropriates all such duties for a specific purpose. When the principal avails himself of the fruits of his agent's act, he clearly ratifies the act itself. An appropriation of moneys collected is the most absolute adoption of the act of collection.

In *De Lima vs. Bidwell* this Court gave judgment for the plaintiff upon two grounds, first that the defendant had exacted money from plaintiff without warrant of law and second that such exaction had not been legalized by Congress. This second ground of the decision was basic, for if the exaction had been legalized the defendant must have been entitled to judgment. The language of the ratifying act showed plainly the actual intention of Congress to approve and ratify the exactions. True, this Court held that the act "should not be interpreted so as to make it retroactive," but why? Not because it was the natural meaning of the language of the act that it should be prospective only in its operation, but because this Court held that after suit brought Congress has *not the power to legalize* the unlawful exaction, and *therefore* under well settled rules the act should be interpreted as intended to accomplish something within, not something beyond, the power of Congress.

It is seldom, if ever proper, for counsel to argue that where two reasons are given by this Court for a decision upon a material point one of these reasons is *obiter*, for if one is, then why not the other, with the absurd result that both are, and there is no binding decision. This Court has very recently stated this well settled doctrine.

> *Union Pacific vs. Mason City Co.*, 199 U. S., 160.

But in *De Lima vs. Bidwell* the conclusion that the act should not be interpreted so as to make it retro-

active is based upon the conclusion that such a retroactive enactment would be beyond the power of Congress with respect to an action pending at the time of its passage. That Congress has not the power is the basis for the interpretation of the act. Neither is an *obiter dictum*, both are correlated decisions upon material points directly involved. The conclusion upon the power of Congress is an integral part of the conclusion upon the interpretation of the act, and constitutes a judicial precedent.

The decision of *DeLima vs. Bidwell* is thus a controlling authority on the proposition that Congress cannot validate the illegal action of the officers of the Government in exacting moneys from these claimants under the guise of duties but without any warrant of law, after, as in the case at bar, suit has been instituted for their recovery.

In the *Lincoln, Warner Barnes* case it was urged in this Court with great insistence both upon the orginal hearing and upon the reargument that the Act of July 1, 1902, ratified the collection of the duties there (as here) involved. This Court *passed upon this question squarely in the first decision (197 U. S., 429).* As in the DeLima case, the question there was twofold (1) the construction of the Act; (2) the power of Congress. Both points were considered and adjudicated. The Court held upon the former question that as the Act of 1902 ratified only such actions of the authorities of the government of the Philippine Islands as were in accordance with the provisions of the order it did not extend to the collection of duties on imports from the United States which was not within its provision. Upon the latter this Court said: "See further *DeLima vs. Bidwell*, "182 U. S., 1, 199, 200;" thereby incorporating and adopting the decision in the DeLima case holding that ratification after suit was brought is beyond the power of Congress. This question of power was the precise point made and argued by the Solicitor-General in that case (197 U. S., 424, 425).

Upon the petition of the Attorney General for rehearing raising this same point again, this Court ordered a rehearing :

> " as to the question whether Congress ratified the
> " collection of the sums sought to be recovered
> " in these suits."

This question was again presented to this Court in a two-fold aspect (1) the construction of the act ; (2) the power of Congress to ratify. In the opinion on the reargument written by the Chief Justice, the Court " adhered to the conclusion previously announced " (202 U. S., 500). While the Court again held that the Act of July 1, 1902, did not by its express terms ratify the duties on imports from the United States exacted after April 11, 1899, but only those on imports from foreign countries up to the time of the passage of the Act of March 8, 1902, and from the United States prior to the ratification of the treaty (202) U. S., 499), it cited and approved the decision in *DeLima vs. Bidwell* upon the question of power. At page 498 (202 U. S.), the Court says :

> " This construction is favored by the considera-
> " tion that *the suits had been begun when the Act*
> " *of July 1,1902, was passed*, and that, *even if* Con-
> " gress could deprive plaintiffs of their *vested*
> " *rights in process of being asserted, (Hamilton vs.*
> " *Dillin*, 21 Wall., 73), still it is not to be pre-
> " sumed to do so on language which, literally
> " taken, has a narrower sense.
>
> " Moreover, the act of July, 1902, was passed
> " with full knowledge and after careful considera-
> " tion of the decisions of this Court, and Con-
> " gress was aware that *grave doubt, at least*, had
> " been thrown upon its power to ratify a tax
> " under circumstances like the present (*DeLima*
> " *vs. Bidwell*, 182 U. S., 1, 199, 200). This affords
> " a special reason for believing that if it had

" intended to *encounter the limitations of that case*
" it would have done so in clear words from which
" there was no escape."

The " limitations of that case " evidently are that *after suit has been brought Congress has not the power to ratify.* On July 1, 1902, many of the suits now pending in the Court of Claims had not yet been brought, so that it may be urged that Congress could then have validated the collection of duties for the recovery of which suit had not been instituted without encountering the limitations in the decision in *De Lima vs. Bidwell.* Clearly, under the decision just quoted, it could not have, as appears to have been attempted by the act now under discussion, ratified the collection of duties, the legality of whose collection was then before the courts.

Hence, under " the limitations of that case " this suit, begun on July 1, 1902, is not affected by the Act of June 30, 1906. It is therefore incumbent upon the Court interpreting this act in accordance with these decisions, to read into the Act of 1906 the words " except with respect to the duties for the recovery of which suits are now pending," in order to sustain it as a constitutional measure *in toto.* Otherwise it must be deemed clearly unconstitutional and void in so far as it purports to affect the suit at bar and other similar suits pending at the time of its passage.

It is fair to assume that Congress intended the act to apply only to those claims which not having been crystallized into suit, the decisions quoted possibly left at the mercy of Congress. In other words, to treat it as a sort of statute of limitations in favor of the Government against those who were not diligent in safeguarding their rights. This would seem to be more consistent with justice than to assume that Congress, actuated by a desire to confiscate, passed a law such as this Court had said " was beyond its power."

This Court has well said that "the supposition that the Government will not pay its debts, or will not do justice is not to be indulged" (*Gibbons vs. U. S.*, 8 Wall., 274).

The Act of 1906 must not be interpreted as in conflict with *De Lima vs. Bidwell* and *Warner Barnes vs. United States*, unless no other construction can be adopted. If the Court cannot adopt the construction suggested, then we submit that the decisions of this Court in *De Lima vs. Bidwell* and the *Lincoln Warner Barnes* case on this point are conclusive and require this Court to hold that with respect to the rights of these claimants and of others similarly situated, the Act of June 30, 1906, is of no effect.

SECOND POINT.

IN VIEW OF THE FINDINGS OF FACT IN THE CASE AT BAR, THE DECISION OF THIS COURT IN DOOLEY VS. UNITED STATES, AND LINCOLN, WARNER BARNES VS. UNITED STATES, ARE CONCLUSIVE UPON THE QUESTION OF VOLUNTARY PAYMENT.

It is now urged in behalf of the United States that claimants have no case because of their alleged failure to make a protest against the exaction of the moneys in suit. It is enough to say that this question was decided in favor of the claimants in the *Lincoln, Warner Barnes* case, and is no longer an open one.

For convenience of reference, we print in parallel columns the findings of fact of the Court of Claims involving the question of voluntary payment in the *Warner Barnes case* with those in the case at bar.

FINDINGS IN WARNER BARNES CASE.

Finding VIII. (40 Ct. Cl. 6).

Upon the arrival of vessels at the port of Manila containing such articles of merchandise the military officer of the United States then acting as Collector of Customs at that port placed said vessels under military guard until they should be duly discharged and no delivery of imported merchandise from such vessels was permitted to be made in said port of Manila to the importer until the duties assessed thereon had been duly paid. The said Collector upon the arrival of vessels containing such imported merchandise prelim inary to the assessment and payment of customs duties thereon required the importer to enter said merchandise for the payment of duty at the Custom House within ninety days after importation. In this case it appears these regulations were conformed to.

FINDINGS IN CASE AT BAR (R., p. 23).

FIFTH. Upon the arrival at the port of Manila, during the years 1899, 1900, and 1901, of all vessels containing merchandise shipped from the United States, including the merchandise so shipped by the claimants, the officer of the United States Army then acting as collector of customs at that port, *placed upon said vessels a military guard, as provided for in the said rules and regulations*, and proceeded to assess, levy, and collect customs duties upon the said merchandise at the rates and *in the manner prescribed in and by said order*, Customs Tariff and Regulations, *with respect to like articles of merchandise imported from foreign countries*, all of which acts of the said military officer acting as collector were done by him in compliance with the terms of the said order, Customs Tariff and Regulations, and amendments thereof, and in conformity with the provisions thereof relating to similar articles imported into the Philippines from foreign countries.

The order itself under which the moneys were exacted specifically provides that the tariff shall be "levied as a military contribution" (R., p. 30) thus negativing at the outset the idea either that a protest would have been considered or that there was anything voluntary about the payment.

The Court of Claims has found as a fact that in exacting the payment of these moneys the military officers complied with the regulations relating to the collection of duties on foreign imports. Upon this point the regulations provide (R., pp. 33, 35):

> "1. Every vessel shall, on arrival, be placed "under military guard until duly discharged.
>
> "3. No vessel shall be allowed to clear for "another port until all her cargo shall be landed "or accounted for. All goods not duly entered "for payment of duty within ten days after their "arrival in port shall be landed and stored, the "expense thereof to be charged against the goods.
>
> "12. No delivery of imported merchandise shall "be made to the importer unless he shall have "duly paid in cash the duties assessed thereon.
>
> "14. Any goods, wares, or merchandise not "duly entered for payment of duty within ninety "days after importation shall be sold at auction "by order of the officer in command of the United "States forces after five days' public notice con-"spicuously posted at the port; provided, that the "period of ninety days may be extended by said "officer not exceeding a period of six months from "the date of importation when good and sufficient "reasons therefor are presented to him, if in his "judgment the interests of the Government will "permit of such extension. The proceeds of such "sale will be kept for ten days subject to the de-"mand of the importer, after deduction of the "proper duties on the goods and all expenses of "storage and sale."

It will be seen from a comparison of these findings in the case at bar, with the findings in the Warner Barnes case, that duress is far more clearly shown here than there. *Protest was neither alleged nor found as a fact in the Warner Barnes case* nor is it alleged or

found here, but from the fact of duress found by the Court, the law raises the conclusion of an involuntary payment of money, to recover which this action may be maintained.

Upon the reargument of the *Lincoln, Warner Barnes* case the point was again clearly made that the absence of protest was a sufficient ground for denying the claim (202 U. S., 495), where the same argument was made and the same cases cited as in the brief now submitted for the United States.

It is seldom proper to assume that because a point made in the argument is not mentioned in the opinion, it has not been considered by this Court. That assumption cannot be made here because the record of the *Lincoln, Warner Barnes* case shows that this point as to a voluntary payment was raised in behalf of the United States not only upon the original argument but upon the application for a rehearing and in the reargument (see "Brief filed (for the United States) under order of Court upon petition for rehearing," pages 22–24, where the protest cases, *Elliott vs. Swartward, Chesebrouyh vs. United States*, etc., etc., are all cited and discussed).

In the *Warner Barnes* case the Court of Claims in its opinion, 40 Ct. Cl., 31, said:

> "So far as appears from the evidence *the privi-*
> "*lege of sailing away with its goods was not pro-*
> "*hibited to the plaintiff*, and while it does appear
> "it was prohibited from landing the goods, with-
> "out first making payment of the duties, this does
> "not deprive such payment of the nature of being
> "voluntary."

An apt answer to this suggestion is to be found in Lord ERSKINE'S speech upon the Orders in Council in 1808. He said:

> "Is it not adding insult to injury to say to America that her shipping is not compelled to come into our ports since they may return back

again? Let me suppose that his majesty had been advised whilst I was a practiser at the bar, to issue a proclamation that no barrister should go into Westminster Hall without passing through a particular gate at which a toll was to be levied on him. Should I have been told gravely that I was by no means compelled by such a proclamation to pass through it? Should I have been told that I might go back again to my chambers with my briefs and sleep there in my empty bag if I liked it? Would it be an answer to a market gardener in the neighborhood of London, if compelled to pass a similar gate erected in every passage to Covent Garden, that he was by no means compelled to bring his greens to market, as he might stay at home with his family and starve?"

"On the subject of tolls, however, let me do justice. Let me not forget the saving proviso which I hear has been introduced into the bill, viz: that those who do not choose to pay it are at liberty to burn their goods, upon payment of expenses. How gracious! * * * A trespass is committed by another man's horse, upon which you immediately impound mine, that had never trespassed; but God forbid that you should be so unjust as to levy the penalty; no; I am at liberty to shoot him in the pound upon paying the poundkeeper's expenses."

Speech of Lord ERSKINE; Hansard's Parliamentary Debates, First Series, vol. 10, p. 966.

We shall not countenance the assumption that so elementary a point was overlooked by this Court, particularly in view of its recent decisions in *Chesebrough vs. United States*, 192 U. S., 253, and *United States vs. Cuba Mail S. S. Co.*, 200 U. S., 488, cases on the very point that voluntary payment precludes a recovery.

We, therefore, submit in conclusion on this point that as there was no allegation or finding of protest in

either the *Lincoln* or *Warner Barnes* case, as the facts found in the case at bar show more clearly than either the facts admitted in the *Lincoln* case, or the facts found in the *Warner Barnes* case, that the payment was involuntary, and as the point that lack of protest precluded recovery was twice argued in the *Lincoln, Warner Barnes* case, the decision in that case is controlling that where the facts show an involuntary payment of moneys exacted wholly without warrant of law by an agent of the United States, and made under duress of goods, lack of protest is not a defense in an action for the recovery of such moneys brought against the United States.

THIRD POINT.

THE FACTS AS FOUND BY THE COURT OF CLAIMS IN THIS CASE ESTABLISH THE LEGAL CONCLUSION THAT THE PAYMENT OF THE DUTIES WAS INVOLUNTARY.

While, as was stated above, we think this question already completely foreclosed by the two decisions in the *Lincoln, Warner Barnes* case as well as in the first *Dooley* case, the insistence of the learned counsel for the Government in again raising and elaborately discussing this question must be our apology for treating it as an original question.

The appellants' proposition here is that there can be " no recovery without protest." Our answer is that where the facts in a case demonstrate payment under compulsion or duress there must be a recovery whether there was protest or not, since protest is only one of many circumstances which may be evidence of the ultimate fact that the payment was involuntary. The unsoundness of the Government's position can, we think, be demonstrated by a simple

and somewhat elementary analysis of the nature of voluntary and involuntary payment and their relation to protest, and while the subject has been recently discussed by this Court in the cases of *Chesebrough vs. United States* and *United States vs. Cuba Mail S. S. Co.* still as the facts there showed a *voluntary* payment, we shall consider the topic at length.

An act is said to be voluntary when it is the result of the free and unfettered choice of the actor. Philosophically the test may be difficult of application since the metaphysician may contend that where the highwayman's pistol is pointing at A's head awaiting the reply to a summons to part with his pocket-book, A still has the choice of either continuing to live, although with a depleted exchequer, or plunging down to Orcus with little hope that his estate will profit by his heroism. The law, however, has no such difficulties to solve, for it deals with men as they are in everyday life. If a man makes a payment because in imminent danger of injury to person or property, his submission is not deemed to make his choice a free one.

If his choice is not free it is clear that the party who has received the money under those circumstances cannot in equity and good conscience retain it, hence the law has provided a remedy.

Thus in every case where this remedy is invoked, there is only one question: Do all the circumstances show that the payment was the voluntary unfettered act of the defendant or was it induced or brought about by such danger to person or property as would have left to the ordinarily prudent man no practical alternative save payment.

The final fact, therefore, to be ascertained by the Court must be not what was the actual state of mind of the plaintiff but what, under the circumstances of the particular case was his "legal state of mind." Was he a volunteer or a victim of overweening necessity.

As this Court has said:

"Now it can hardly be meant in this class of "cases, that to make a payment involuntary, it "should be by actual violence or any physical du- "ress. It suffices, if the payment is caused on "the one part by an illegal demand, and made on "the other part reluctantly and in consequence "of that illegality and without being able to re- "gain possession of his property except by sub- "mitting to the payment. * * * The payment "of the increased duties thus caused was wrong- "fully imposed on the importer and was submitted "to merely *as a choice of evils.*"

Maxwell vs. Griswold, 10 How., 242, 256.

Mr. Justice BRADLEY speaking of that case says:

"In that case (Maxwell v. Griswold, 10 How., "241) it is true the fact that the importer was not "able to get possession of his goods without mak- "ing the payment complained of was referred to "by the Court as an important circumstance; "but it was not stated to be an indispensable "circumstance. *The ultimate fact* of which that "was an ingredient in the particular case *was the "moral duress not justified by law.* When such "duress is exerted under circumstances sufficient "to influence the apprehensions and conduct of a "prudent business man, payment of money wrong- "fully induced thereby ought not to be regarded "as voluntary. But the circumstances of the "case are always to be taken into consideration. "When the duress has been exerted by *one clothed "with official authority or exercising a public em- "ployment, less evidence of compulsion or pressure "is required; as where an officer exacts illegal fees* "or a common carrier excessive charges. But the "principle is applicable in all cases according to "the nature and exigency of each."

Robertson vs. Frank Brothers, 132 U. S., 17, 22, 23.

In the Civil Law the doctrine of duress and the underlying reasoning were systematically worked out:

"In the Roman law we have several rulings to the "effect that *in determining whether consent was ex-*

> " *torted* by fear we are to take into consideration
> " the physical condition, the sex, the mental and
> " nervous condition, the education and the peculiar
> " social and domestic relations of the party
> " threatened."
>
> *Wharton, on Contracts*, Vol. I., § 147.

This is in line with Mr. Justice BRADLEY's reasoning as to the greater presumption of duress where the party is dealing with an official clothed with the power of the State.

Judge COOLEY stated the matter pithily when he said in *Hackley vs. Headley*, 45 Mich. 569, 574, 576 :

> " Duress exists when one by the unlawful act of
> " another is induced to make a contract or per-
> " form some act under circumstances which de-
> " prive him of the exercise of free will."
>
> * * * * * *
>
> " Duress of goods may exist when one is com-
> " pelled to submit to an illegal exaction in order
> " to obtain them from one who has them in pos-
> " session but refuses to surrender them unless the
> " exaction is submitted to. * * * And the
> " mere threat to employ colorable legal authority
> " to compel payment of an unfounded claim is
> " such duress as will support an action to recover
> " back what is paid under it."

This case contains a careful review of the leading English and American cases on the subject.

The rule of law being thus clearly settled, what were the admitted, unquestioned, facts in this case from which the Court must conclude that the payment was involuntary ?

The findings of fact of the Court of Claims (Rec., p. 23) set out the designation by the Commanding General in the Philippines of certain *army officers* to act as collectors of customs at Manila to enforce a certain Customs Tariff and Regulations " *as a military contribution* " (which are annexed to the Record, p. 27). The statement continues (p. 23) :

> " FIFTH. Upon the arrival at the port of Manila
> " during the years 1899, 1900 and 1901 of all

"vessels containing merchandise shipped from "the United States including the mer- "chandise so shipped by the claimants, the "officer of the United States Army then "acting as collector of customs at that Port "*placed upon said vessels a military guard as* "*provided for in the said rules and regulations* and "proceeded to assess, levy and collect customs "duties upon the said merchandise at the rates "and in the manner prescribed in and by said "Order, Customs Tariff and Regulations, with "respect to like articles of merchandise imported "from foreign countries all of which acts of the "said military officer acting as collector were "done by him in compliance with the terms of "the said order Customs Tariff and Regulations, "and amendments thereof, and in *conformity with* "*the provisions* thereof relating to similar articles "imported into the Philippines from foreign "countries."

The said Customs Tariff and Regulations provide (Rec., p. 33) :

"I. *Every vessel* shall on arrival, *be placed under* "*miiltary guard* until duly discharged. * * * "3. No vessel shall be allowed to clear for "another port until all her cargo shall be landed "or accounted for, all goods not duly entered for "payment of duty within ten days after their "arrival in port shall be landed and stored, the "expense thereof to be charged against the "goods. * * *

"14. (Rec., p. 37) Any goods, wares, or mer- "chandise not duly entered for payment of duty "within ninety days after importation *shall be sold* "*at auction by order of the Commandant* after five "days public notice conspicuously posted at the "port."

Thus when the complainants' vessel arrived from the domestic port of New York at the equally domestic port of Manila she found herself and her cargo in possession of Federal troops, whose presence, however otherwise desirable, was designed to and very effectually did prevent claimants from taking posses-

sion of their goods and plying their trade. This situation, so obviously detrimental to plaintiff's property and business, could only be effectually determined by his paying the ransom demanded, *i. e.*, the alleged duties or military contributions—admittedly illegal exactions.

It is true they might have relinquished the goods to the military guard and abandoned their business and property, or again they might have sailed away, but as this Court has said (*vide supra*) *this was only a choice of evils* and one which they were not bound to make. It was in fact no choice at all since the theory of free will cannot hold its own against the doctrine of inevitable necessity in the form of imminent and potentially persuasive bayonets.

The importer whose goods are in the safe-keeping of Krag Jorgensens over whose action he has no control, cannot be successfully likened to the man who buys a revenue stamp from the peaceful apothecary and then sues the government on the ground that he feared the law if he did not stamp his manifest.

> "Where a party pays an illegal demand with full knowledge of all the facts which render such demand illegal, without an immediate and urgent necessity therefor, *or unless to release his person or property from detention*, or to prevent an immediate seizure of his person or property, such payment must be deemed voluntary and cannot be recovered back."
>
> *United States vs. Cuba Mail S. S. Co.*, 200 U. S., 488, 494.

It seems difficult to contend that under the circumstances disclosed in this record the plaintiff can be thought to have made anything else than a payment under duress of goods. To suppose otherwise would lead to the result that having a free choice Heinszen, actuated by motives of pure philanthropy, chose to donate $16,827 to the Government of the United States.

In view of the fact that the plaintiff is not an American citizen but a German subject, such an unusual occurrence cannot be rested upon any theory of patriotism.

The learned Attorney General has cited a case decided by District Judge PLATT, *Dewell vs. Mix*, 116 Fed. Rep., 664, in which the importer

> " was advised to protest, but as a good citizen
> " and patriotic business man he was disinclined
> " to commit any act which might in any quarter
> " be construed as evincing a disposition to hamper
> " or embarrass the Government in its fiscal rela-
> " tions. Consequently he refused absolutely to
> " protest and at a later date was very much dis-
> " turbed when he learned that during his absence
> " his partner had filed a written protest upon the
> " entry of a small cargo" (p. 665).

Chauvinistic piety of the kind here exhibited may be possible in the case of an American citizen, though we know of no other instance in the books; but the Court can scarcely assume Heinszen to have had any such feeling toward a country not his own.

Nevertheless, the Government's contention seems to be that any and every payment, when there is no proof of protest, is in law voluntary. Thus the wayfarer who bowing to the inevitable surrenders his purse to the pistol of the highwayman in stoic silence is to be construed into a cheerful giver. This is to attach to "protest" some mystic quasi sacerdotal potency such as the ancient Romans attached to certain words and formulas in their contracts.

But modern law knows of no such verbal magic.

Protest is no fetich.

Such an argument is based upon a misconception of the function and value of protest.

The fact to be determined on the evidence is always whether the actor had or had not a free choice; did he act spontaneously or under compulsion? A

statement on his part that he merely yielded to *vis major*, though remaining of the same opinion still, is a most important evidential fact. Taken in connection with other circumstances it may often prove conclusively that a payment was not made through any voluntary desire to benefit the donee, but solely to recover one's liberty or property.

If, as is contended, one who does not protest is a volunteer, then the existence of protest should be conclusive of the character of the payment and every protestant should be allowed his day in Court to challenge the legality of the payment; but this cannot be since it has been repeatedly held that even where there was protest there can be at common law no recovery where there was no compulsion. In other words, the actual fact that there is no compulsion negatives any inference to be drawn from the fact of protest.

As is said by a recent and eminent law author:

> " If, independently of protest, the circumstances
> " under which a payment is made, would not
> " justify a recovery thereof, the fact of payment
> " under protest will not render such payment in-
> " voluntary. In such cases the importance of
> " paying under protest is that *the protest is evi-*
> " *dence* of the plaintiff's intention at the time when
> " payment was made."

Keener Quasi Contract, p. 423, note, citing *Lamborn vs. County Commissioners*, 97 U. S., 181; *Detroit vs. Martin*, 34 Mich., 170; *Flower vs. Lance*, 59 N. Y., 603; *de la Cuesta vs. Ins. Co.*, 136 Pa. St., 62.

In *Lambert vs. County Commissioners*, 97 U. S., 181, 185, 187, this Court through Mr. Justice BRADLEY said:

> " It is settled by many authorities that money
> " paid by a person to prevent an illegal seizure of
> " his person or property by an officer claiming
> " authority to seize the same or to liberate his
> " person or property from illegal detention by
> " such officer may be recovered back in an action
> " for money had and received on the ground that

" the payment was compulsory, or by duress or " extortion. Under this rule, illegal taxes or " other public exactions, paid to prevent such " seizure or remove such detention may be re- " covered back, unless prohibited by some statu- " tory regulation to the contrary * * *.

" Where a party pays an illegal demand with a " full knowledge of all the facts which render such " demand illegal, without an immediate and urgent " necessity therefor, *or* UNLESS *to release his person* " *or property from detention, or to prevent an im-* " *mediate seizure of his person or property,* such " payment must be deemed to be voluntary and " cannot be recovered back. *And the fact that the* " *party at the time of making the payment files a* " *written protest does not make the payment involun-* " *tary.*"

It is thus clear both from the standpoint of sound reasoning and upon the highest authority that protest is nothing more than an evidentiary fact relevant but in nowise conclusive upon the question of voluntary payment.

When all the circumstances show that the actor was in such a situation that he had a free choice, his mere protest that he pays unwillingly will not be sufficient to negative the inevitable inference that his payment was in fact voluntary and not due to overruling necessity.

Compulsion, not protest is the basis of the recovery, hence appellant's proposition that

" there can be no recovery of illegal duties unless paid under compulsion *and with protest at the time of payment*"

is based upon a misapprehension, since compulsion and protest are not independent legal categories but protest (except where required by statute as in the cases cited by the Government) is merely evidence of compulsion.

" A party who has paid voluntarily under a claim of right, shall not afterward recover back the

money, although he protested at the time against his liability" (SHAW, C. J., in Preston v. Boston, 12 Pick., 13).

Detroit vs. Martin, 34 Mich., 170, 177.

"If he voluntarily yielded to the claim and there was *no duress of person or of goods, or fraud on the part of the creditor*, the payment concludes him; and he could not avoid the force or effect of the act of payment as an admission, or reserve the right to draw the matter into controversy, thereafter, by paying under protest."

Flower vs. Lance, 59 N. Y., 603, 610.

Where, on the other hand, the facts indicate compulsion and consequent elimination of freedom of choice there is no necessity of protest to constitute a right of recovery. In such cases, and they include the case at bar, protest is mere surplusage.

In the well known case of *Swift Co. vs. United States*, 111 U. S., 22, 28, 30, the authorities are examined and the principles governing payments under compulsion clearly announced.

"The parties were not on equal terms. The appellant had no choice. The only alternative was to submit to an illegal exaction or discontinue its business. It was in the power of the officers of the law, and could only do as they required. Money paid or other value parted with under such pressure has never been regarded as a voluntary act within the meaning of the maxim, *volenti non fit injuria*. * * * No formal protest made at the time is *by statute* a *condition to the present right of action*."

This case is adverted to and its doctrine as to protest reaffirmed in

United States vs. Edmonston, 181 U. S., 500, 514.

See, also, Cooley Taxation, p. 1505.

The case of *Clinton vs. Strong* (1812), 9 Johns., N. Y., 370, closely resembles the case at bar. A

vessel sailing from England before the Non-Intercourse Act (November, 1810) was libelled on arrival in New York, and though subsequently released the Marshal insisted upon payment of his costs before releasing the vessel. The action of the owners to recover the costs so paid was sustained, although there was no evidence of any kind of protest, the Court holding :

> " The payment of the costs could not be con-
> " sidered a voluntary act. They were exacted
> " by the officer *colore officii*, as a condition of the
> " redelivery of the property. It would lead to the
> " grossest abuse, to hold a payment made under
> " such circumstances, a voluntary payment, preclu-
> " ding the party from contesting it afterward."

The position of the Government is based upon a failure to observe the clear distinction between (1) a protest as evidence of involuntary payment at common law ; and (2) protest at common law required as notice to an agent who receives money in order to obviate the defense that he has paid it over to his principal ; and (3) statutory protest in revenue and customs cases.

The first class we have just considered.

The effect of the second class of protest, or notice of dissatisfaction, is to enable the agent to protect himself against an action by retaining the money in his hands.

The action for money had and received is based upon the theory that the defendant has money in his hands which it is unjust and inequitable to allow him to retain, but the basis of the action fails where the agent has, without knowledge of any claim of illegality, paid it over to his principal.

The oft-cited case of *Cary vs. Curtis*, 3 How., 236, 247, formulates the unquestioned rule and its reason :

> " So far as the liability of agents in this form
> " of action appears to have been considered, the
> " general rule certainly is, that the action should

" be brought against the principal and not against
" a known agent, who is discharged from liability
" by a *bona fide* payment over to his principal,
" *unless anterior to making payment over he shall*
" *have had notice from the plaintiff of his right*
" *and of his intention to claim the money. The ab-*
" *sence of notice will be an exculpation of the agent*
" *in every instance.*"

But evidently no question of protest in the sense of notice of dissatisfaction can arise here since the action is against the United States (*i. e.*, the principal) and not the agent—the military collector. This obvious distinction was recognized in the *DeLima case* (182 U. S., p. 179) :

" The fact that the collector may have depos-
" ited the money in the Treasury is no bar to a
" judgment against him since Revised Statutes,
" § 989, provides that in case of a recovery of any
" money exacted by him and paid into the Treas-
" ury, if the Court certifies that there was proba-
" ble cause for the act done, no execution shall
" issue against him, but the amount of the judg-
" ment shall be paid out of the proper appropria-
" tion from the Treasury."

" *The cases which exempt the agent from the suit,*
" *if he has in the meantime paid over the money to*
" *his principal without notice, do not apply.* Here
" is no person but the defendant, against whom
" the suit would in any event be brought, and
" the money was paid by compulsion. It was
" extorted as a condition of granting the clear-
" ance, and not paid with the intent or purpose
" that the collector should pass it to the credit of
" the United States. The case of Snowden v.
" Davis, 1 Taun., 359, lays down this just distin-
" ction, that notice to the agent is not requisite in
" the case of a compulsory payment and one not
" made expressly for the use of the principal.'

The third class of " protest " is the formal notice which customs or revenue statutes require shall be filed in some cases at the time of payment, in others at the time of liquidation of the duty. Protest in this

sense is in the nature of a notice of appeal, as instanced in the protest required by the present Customs Administrative Act.

Protest in the true sense, *i. e.*, as evidence that the payment was involuntary, must be made at or before the time of the payment, as otherwise it would have no relevancy upon the question of whether freedom of choice existed *when the payment was made.*

Statutory protest, on the other hand, may be made at any time permitted by the statute, which, in the case of the existing customs law, is ten days after the liquidation of the entry.

> " The moneys paid by the importer, in order
> " that he may get possession of his merchandise,
> " are forthwith paid into the Treasury of the
> " United States, and *the function of the protest to*
> " *warn the Government of the fact of dissatisfac-*
> " *tion, and to commit the importer to a specific*
> " *statement of the grounds of his objection is equally*
> " *performed, whether made at the time of such pay-*
> " *ment or within ten days after the ascertainment*
> " *and liquidation of the duties.*"
>
> *Saltonstall vs. Birtwell*, 164 U. S., 54, 69.

Counsel for the Government have cited some custom cases as authority on the proposition that duress is not a ground of recovery where there is an absence of protest.

These cases either deal with protest in the sense of notice to an agent or as a statutory prerequisite. Much stress is laid on the case of *Elliot vs. Swartwout*, 10 Pet., 137. The position of the Court there was that no action will lie against a collector when

> " acting in good faith and under instructions
> " from the Treasury Department, and *no protest*
> " *being made at the time of payment or notice not*
> " *to pay the money over, or intention to sue to*
> " *recover back the amount given him*" (headnote. Italics in original.)

On the other hand in the case of *Nichols vs. United States*, 7 Wall., 122, the customs law required a written

protest as a condition precedent to recovery, and this Court merely held that such statutory condition precedent could not be dispensed with. There was nothing here to revolutionize the common-law principle that the fact of duress establishes the conclusion that the payment is involuntary. The statute was clear and mandatory :

> " Nor shall any action be maintained against
> " any collector, to recover the amount of duties
> " so paid under protest unless the said protest
> " was *made in writing and signed by the claimant*,
> " at or before the payment of said duties, setting
> " forth distinctly and specifically the grounds of
> " objection to the payment thereof."

Of course, no such questions can arise here because this is not a Customs case at all. If it had been, the Court of Claims would not have had jurisdiction, nor would there have been any right of action against the Collector. Both these remedies were open to claimant under the decisions in the *De Lima* and *Dooley* cases, because the claim was not one arising under the Customs laws, and hence governed, not by any specific statutory requirements, but by the general rules of the common law.

> *Dooley vs. United States*, 182 U. S., 222, 225–7.

Not only is this not a customs case, but the peculiar circumstances differentiate it from the ordinary case to recover moneys exacted as duties under color of a revenue law. The presence of a military guard on claimants' ship, the seizure of claimants' property by that guard and their orders to sell the property if the moneys exacted as duties were not paid, show that claimants had no " freedom of choice " when the payment was made.

Nor does the decision in *Hamilton vs. Dillin*, 21 Wall., 73, give aid to the Government's contention that the payment here was voluntary.

There the complainant had *voluntarily* applied for a permit to carry on the specially licensed trade, a trade with "enemy country," which trade the President had the power to prohibit *in toto*, and for such permit paid without compulsion a fee to Dillin, the Treasury agent. He then sued Dillin to recover this fee. There was no duress or compulsion of any kind either of person or property in relation to the payment of the fee, for it was paid before the trading was begun. Thus, Hamilton in that case had a "freedom of choice" and exercised it. But, in the case at bar, Heinszen & Co. paid to rescue their goods, which they were transporting in the course of regular and legitimate commerce, to satisfy an unconstitutional and unlawful exaction, made after the goods had been seized and held by military force. Hamilton paid for the privilege of engaging in an illegal and forbidden traffic, but one which the President had the power to license. By purchasing such license Hamilton was not only receiving a *quid pro quo*, but was not submitting to any illegal action since the license fee was properly and lawfully exacted within the power of the President.

In Heinszen's case coercion was conspicuously and picturesquely present; in Hamilton's obviously absent.

The point so strongly urged by the Government that protest should have been made because required by the order under which the duties were collected, and in order to secure a review by the commandant of the decision of the military collector that goods brought from the United States after April 11th, 1899, were imported from a foreign country and so subject to duty, is so fully answered by the decisions of this Court in *In re Fassett, Petitioner*, 142 U. S., 479, 483, and *DeLima vs. Bidwell*, 182 U. S., 175–179, that it does not require discussion. It is disposed of in the opinion of the Court below, succinctly and convincingly. Judge BARNEY says for the Court :

> "It can hardly be successfully maintained that
> "the Government can impose an illegal tax and at

" the same time *prescribe the only means in which* " *objections can be made to its payment*" (Rec., p. 15).

In conclusion upon the question of voluntary payment we respectfully submit:

I. The facts show that the payment was under duress; that no free choice was left the complainant save to pay and retake his goods. Hence the payment was involuntary, and absence of protest is immaterial.

II. Protest is not essential to recovery in this case, because (1) this is not an action against an agent who has paid over in good faith the money to his principal, nor (2) is there any statute making "protest" a condition precedent to recovery.

Therefore the Government's contention that not only compulsion, but also protest, must be proved to sustain this action is untenable.

FOURTH POINT.

THE ACT OF JUNE 30, 1906, IN SO FAR AS IT ATTEMPTS TO DEPRIVE CLAIMANTS HERE OF THEIR RIGHT TO THE MONEYS WHICH THE UNITED STATES HAVE IN THEIR HANDS "JUSTLY AND EQUITABLY BELONGING" TO CLAIMANTS IS UNCONSTITUTIONAL AND VOID.

While we consider as stated in our first point that this question has been determined finally by this Court in the other Insular Cases above cited, nevertheless the insistence of the Government in regarding the decisions referred to as not authoritative on the question of the power to ratify and the expressions therein contained as mere *dicta*, make it proper to examine this point as though the question were a new one and to examine cases *seriatim*, though it may extend this brief beyond the usually desirable brevity.

The proposition of the learned counsel for the United States as expressed in their own language (briefs in Court of Claims) is as follows:

> "The Government takes the position in this case that this act validates the collection of all Tariff duties paid on goods shipped into and from Philippine ports prior to March 8, 1902, and is an effectual bar to the recovery of any of the duties so paid in suits *now pending* or that may hereafter be instituted,"

and in their brief here the statement is made (p. 38) that:

> "The Territories are governed by Congress almost entirely independent of any limitations contained in the Constitution,"

and at page 40:

> "The mistake the Court of Claims made was in assuming that Congress has no power to divest a vested right."

Our answer to this position is:

(1) That at the time of the passage of the Act claimants held the title to the moneys exacted from them by the agents of the United States. Consequently this act is not valid since it attempts to transfer claimants' property to the United States without due process of law and to appropriate it to the public use without compensation; and

(2) That the Federal and State cases cited as upholding certain acts curative of defects and irregularities in taxation have no application to the case at bar, which falls within the purview of the Fifth Amendment.

We need not here discuss the question whether that portion of the Fifth Amendment to the Constitution which provides that no man shall be deprived of his property without due process of law applies to the acts of the governmental authorities in the Philippine

Archipelago. That the Constitution is everywhere applicable to the actions of the Government has been settled by the decisions of this Court, the only open question being as to which clauses extend to governmental operation in the new and as yet "unincorporated" possessions acquired from Spain by the Treaty of Paris.

Dorr vs. United States, 195 U. S., 138, 147, 149.

As the right to property is fundamental we take it that Congress can no more resort to confiscation in the new lands than elsewhere in our broad domain. To continue our career of benevolent assimilation by the renunciation of constitutional limitations in favor of the inviolability of private property has not as yet been seriously mooted.

A. The exaction was admittedly unlawful. There was no mere error of classification but a fundamental lack of jurisdiction. Had the question merely been one arising under the misapplication of customs laws then claimant would have had to follow the remedy provided by the same law or regulation, and the collector himself would have been immune from suit. But with respect to these goods brought from the United States the military collector at Manila stood as would the collector of customs at New York, if, under color of his office, he had seized a ship or its equipment, or any other article not comprehended within the scope of the tariff laws. Could Congress after such seizure pass a law ratifying it and imposing duties upon the ship as if it had been at the time of seizure an imported article. Clearly not, we apprehend.

This total lack of basic authority is insisted upon because it serves clearly to differentiate the case at bar from many if not all of the cases cited to sustain appellant's proposition.

Let us assume *arguendo* that instead of money the military collector had taken a piece of the claimant's land; could it be contended or that Congress could

ratify and legalize his act and confirm him or confirm the United States in the possesion of the land as fully to all intents and purposes as if such seizure had been authorized by an act of Congress passed prior to the date when claimant's property was taken, and by such act divest claimant of his title to the land and vest that title in the United States ? It is true that money has no earmarks, but there is no difference in principle because the claimant does not recover his identical dollars. He has the right to recover those very dollars, but because they are " money," this right can be completely satisfied by the payment of other dollars.

In *United States vs. Lee*, 106 U. S., 196, 219, officers of the Government had taken and were holding private property, land, for Government use. They acted, as they believed, in the interests of the Government ; there was no suggestion of any personal moral turpitude in their acts, yet this Court there said :

> " What is that right as established by the ver-
> " dict of the jury in this case ? It is *the right to the*
> " *possession* of the homestead of plaintiff. A right
> " to recover that which has been taken from him
> " *by force and violence and detained by the strong*
> " *hand.*"

Referring to the Fifth Amendment, it was said (p. 218) :

> " If this Constitutional provision is a sufficient
> " authority for the Court to interfere to rescue a
> " prisoner from the hands of those holding him
> " under the asserted authority of the Govern-
> " ment, what reason is there that the same Courts
> " shall not give remedy to the citizen *whose*
> " *property has been seized without due process of*
> " *law and devoted to public use without just com-*
> " *pensation ?*"

The nature of a statute such as the one here involved has been well characterized by a former member of this Court :

> " A statute undertaking to take the property of " A and transfer it to B is not legislation. It " would not be a law. It would be a decree or " sentence, the right to declare which, if it exists " at all, is in the judicial department of the Gov- " ernment. The Act of Congress is little, if any, " more."
>
> STRONG, J., dissenting in *Sinking Fund Cases*, 99 U. S., 710, 738.

> " The great purpose of the requirement (due " process) is to exclude everything that is arbi- " trary and capricious in legislation affecting the " rights of the citizen."
>
> FIELD, J., *Dent vs. West Virginia*, 129 U. S., 114, 124.

It is immaterial that the taking of property assumes the guise of taxation :

> " In determining what is due process of law " regard must be had to substance, not to form."
>
> *Chicago R. R. Co. vs. Chicago*, 166 U. S., 226, 235.

B. Taxation assumes an equivalent; but here the exaction was made because of the act of bringing the goods from the United States, but this act having been performed and completed several years ago and at a time when such act was the common, untrammelled, and untaxed right of all who chose to engage in the Philippine trade, upon what logical or legal theory can it now be taxed ? The property so imported has long since ceased to exist so as to be ascertainable as property. Clearly an attempt now to tax this property would be invalid as without basis. There exists nothing upon which the statute would operate. It is consequently not a tax but an arbitrary transfer of property taken by " the strong hand."

Counsel for the Government say (brief here, pp. 63–64) :

" Congress not only had the power in 1906 to ratify " and legalize the collection of the duties in question,

" but it could, in 1906, have laid the same duties retro-
" spectively. Suppose, under the proper exigency
" Congress should impose a tax of $1 on all deeds re-
" corded during the past ten years. *No one would*
" *question the validity of such an act.*"

The only authorities cited in support of this start-ling if not revolutionary proposition are

Stockdale vs. Insurance Cos. 20 Wall 323
and
Florida Central R. R. Co. vs. Reynolds, 183 U. S. 471.

The *Stockdale* case turned not on the power of Congress to tax retroactively but on the construction of the income tax law of June, 1864, 13 Stat., 281, and the amendatory acts of March 2, 1867, 14 Stat., 477, and July 14, 1870. It was urged in behalf of the insurance companies that under the Act of 1867 the tax on corporate dividends, etc., ceased on December 31st, 1869. The Court held that that act affected only the incomes of individuals, and that the tax imposed on corporate dividends remained in force until Augnst 1st, 1870, when the act of that year, claimed to impose a tax retroactively, in fact terminated this tax.

See the concurring opinion of the Chief Justice and Justice BRADLEY (20 Wall., 333) and *Railroad Co. vs. Rose*, 95 U. S., 78, 79.

That the *Stockdale* case is not an authority on the power of the Legislature to tax retroactively is made evident by the fact that it has never been cited by this Court in any of the numerous decisions herein referred to in which that question is discussed.

In the *Florida Central* case the question before this Court was as stated by Mr. Justice BREWER in announcing the opinion :

" The single question, therefore, to consider is
" whether there is anything in the Federal Con-
" stitution which forbids a State to reach back-
" ward and collect taxes from certain kinds of
" property, which were not at the time collected

" through lack of statutory provisions therefor, or
" in consequence of a misunderstanding of the
" law or from neglect of administrative officials,
" without also making provision for collecting the
" taxes for the same years on other property. It
" will be perceived that there was no new levy of
" taxes. No act of the legislature was passed im-
" posing an additional burden upon the property
" of the State in general, or upon any particular
" property, but the case is one in which *general*
" *levies having been made for the years named*
" certain property which ought to have paid taxes
" under them—and thus contributed its share of
" the expenses of the State—failed to do so, and
" the effort is to compel that property to discharge
" its obligations."

Thus it has recently been held violative of the due process clause for a State to tax a corporation on property not situated within the State. Were this not the rule taxation might become an arbitrary exercise of power, the sheer imposition of penalties.

The principle applied in the case referred is tersely stated in the headnote:

" The power of taxation is exercised upon the
" assumption of an equivalent rendered in the
" protection of the property and person of the
" tax-payer and if such equivalent cannot possibly
" be rendered because the property taxed is wholly
" beyond the jurisdiction of the taxing power, the
" taxation thereof within the domicil of the
" owner amounts to a taking of property without
" due process of law."

Union Transit Co. vs. Kentucky, 199 U. S., 194.

Claimant's right to recover was based upon the actionable wrong done him. This right is property of which he cannot be deprived.

" A right of action to recover damages for an
" injury is property and has the legislature the

" right to destroy such property ? An executive
" may pardon and thus relieve a wrongdoer from
" the punishment the public exacts for the wrong
" but neither executive nor legislature can pardon
" a private wrong or relieve the wrongdoer from
" civil liability to the individual he has wronged."
Angle vs. Chicago R. R., 151 U. S., 1, 19.

Yet, this act, if valid, exercises this very power so emphatically repudiated by Mr. Justice BREWER. The private wrong done claimant by the military collector is fully condoned and he is deprived of his right to sue to recover either from the collector or the Government. Can such a thing be constitutional ?

The answer would seem obvious and elementary :

" The rights of the parties were therefore fixed
" before the new law was passed. The assignee
" had a vested right to the securities, or to their
" value. The legal obligation to return them or
" to pay him their value had been incurred by the
" defendants. To hold that Congress intended by
" this amendatory statute to take away that right
" of action, is to hold that it intended by a retro-
" spective statute to destroy a vested right of
" property or an existing right of action."
Auffm'ordt vs. Rasin, 102 U. S., 620, 622.

In *Sturgis vs. Carter*, 114 U. S., 511 at 519, it is assumed by this Court that if the statute of the State of Ohio under consideration had imposed a tax retroactively it would have been unconstitutional.

The recent decision of this Court in *United States vs. Burr*, 159 U. S., 78, 84, 85, written by Mr. Chief Justice FULLER, leaves no doubt that the same doctrine applies to an Act of Congress.

C. In order to escape the application of those obvious principles the counsel for the Government seek to treat this statute as a curative act designed to heal or validate an irregularity or vice in a tax proceeding. Before attempting to analyze in any detail the cases

cited it may not be inappropriate to set out the general principles governing that class of cases and clearly disguishing them from the case at bar.

The great mass of curative statutes deal with failures to comply with various statutory formalities and requisites which are in their nature not fundamental.

> "Others however", to use the language of the Court of Claims, "belong to an entirely different class and involve the right of the legislative department to cure an entire want of authority of the tax executive to act at all; in other words by retrospection to create a tax which was not a tax before" (R., p. 17).

Nearly all the cases cited by the Government counsel belong to the former category and hence cannot affect this case. One or two cases in the State Courts may be found which seem to support a tax falling into the latter class, but these cases are criticised and questioned by the best text writers and their doctrines repudiated by a nearly unanimous series of State decisions.

As was said recently by this Court in *Donovan vs. Pennsylvania Co.*, 199 U. S., 279, 299, 300:

> "There are cases to the contrary, but in our
> "opinion the better view, the one sustained by the
> "clear weight of authority and by sound reason and
> "public policy is the view we have expressed."

D. Again it must be borne in mind that many if not all the cases in which the curative statute was held valid could well be supported on the theory that the legislative act was an act of *present taxation* analogous to the case of the *Florida Central R. R. Co.* (183 U. S. 471, *supra*), without which property, though legally subject thereto, would have *escaped* taxation.

> "Though it should be held to validate the
> "assessments, it would render them operative
> "from the time of its passage, for it must be

upheld if at all as an exercise of the power of "taxation whereby the legislature adopted the "apportionment and assessment previously made, "and imposed the tax directly upon the property "affected in accordance with such previous assess-"ment."

Lennon vs. Mayor, 55 N. Y., 361, (RAPALLO, J.)

The Legislature has a general power to tax property in the State. Through some mistake or informality of the taxing officers, there is sometimes an irregularity which might allow the tax to be legally avoided. The Legislature finds the property still in the same situation, within its full taxing jurisdiction, and by means of a new law (a curative statute) it in effect imposes a new tax.

A voidable assessment is thus made valid because the Legislature has dispensed with some formality which by prior statute had been made necessary; but it cannot, under the guise of a tax, ratify and legalize a mere tortious seizure—the act "of the strong arm." This distinction and its underlying philosophy have been formulated in a well-known New York case by Mr. Justice PECKHAM, then sitting in the New York Court of Appeals:

"Holding, as we must, that no title or interest in fact passed to the purchaser at these tax sales, and that the original owner, therefore, still retained his title, the effect of the act in question, if valid, is by legislative fiat to transfer the title of the property of Edward C. Wilson, as trustee, to the lessees under these invalid leases for a hundred or a thousand years, as the case may be. Has the legislature of this state the right to take the property of A and transfer it to B under the guise of confirming sales made of such land *in invitum*, but by which no title, in fact or in law, passed from the owner to the purchaser? The statement of the question should be its best answer. Property thus taken is not taken by due process of law.

"This is not a case within the principle that

persons who take conveyances of land by deed, or under legal proceedings which lack validity by reason of some omission or informality, take a title or right subject to the power of the legislature to cure such errors or defects by acts of retrospective legislation. Where the proceeding is wholly *in invitum* and the defect of such a nature that no title has passed, the legislature cannot validate or legalize the proceeding to the extent of itself conveying the title under the form of confirming a sale under which no title passed. (See Remarks of BIGELOW, Ch. J., in Denny vs. Mattoon, 2 Allen, Mass., 361, at 382, 383).

" Nor is the legislation in question an exercise of the power to provide rules of evidence and thus to give a certain effect to a deed or lease as presumptive evidence of the validity of proceedings before its execution (People v. Turner, 117 N. Y., 227). Nor does it attempt to set up a statute of limitation providing that, after the expiration of a certain time, it should be conclusively presumed that all proceedings were regular (People v. Turner, *supra;* Ensign v. Barse, 107 N. Y., 329). It is none of these, but a plain, naked transfer of title by legislation. Any statute which should make a tax deed or lease immediately upon its execution conclusive evidence of a complete and perfect title and thus preclude the owner of the original title from showing its invalidity, would probably be void, because it would, in substance, be an unconstitutional transfer or a confiscation of property, instead of a mere law regulating evidence. I do not refer to cases arising under statutes of limitation, where the owner has some appointed time in which to assert his rights, nor to cases resting on principles of equitable estoppel (Cooley on Taxation, 2nd ed., 297 *et seq.).*

" The defendant claims that the act is valid as an exercise of the power to cure defects in assessments and other proceedings for the imposition and collection of taxes. Such curative power is a branch and a part of the legislative power to tax, and must be sustained under it. The legislature undoubtedly has large powers in the way of curing certain defects in proceedings to tax the citizen. In cases where the proceedings have been such that the citizen has had his chance to be heard before the tax was finally imposed, but nevertheless

defects have been discovered in such proceedings, if the thing omitted and which constitutes the defect be of such a nature that the legislature might by prior statute have dispensed with, or if something had been done, or done in a particular way which the legislature might have made immaterial, the omission or irregular act may be cured by a subsequent statute. This was so stated, and in substantially identical language, in Ensign v. Barse (107 N. Y., 329).

"Such act might take away from the taxpayer a defense to the further proceedings against him to collect the tax, which he otherwise would have had (Tifft v. City of Buffalo, 82 N. Y., 204). Yet even in this case I think the taxpayer must be given reasonable time in which to pay a tax thus validated or thus imposed by the legislature. But where the proceedings are so contrary to the provisions of the statute as to result in no valid assessment whatever, and where the sales made under such valid assessment convey no title or interest in the premises to the purchaser, and the original owner has the same title or interest in his property that he ever had, there is no principle upon which to base the power of the legislature under our Constitution by any legislative act to transfer to the purchaser the title to the property of the original owner, which such purchaser would have had if all the proceedings up to and including the sales had been valid. No case can, I think, be found in this state which countenances such doctrine. From People v. Turner (117 N. Y., 227), and Ensign v. Barse (107 *id.*, 329), back through our reports, I have not been able to find a case which points to the existence of a power on the part of the legislature to convey the title of a man's property from him to another by a mere exercise of the legislative will.

"To hold the act under discussion to be valid is to decide that the legislature has such a power.

"What difference does it make to say that the legislature is acting only in the way of validating proceedings to collect a tax which in justice the owner of the land ought to pay? The answer is that the proceedings have been so fatally defective that *no title has passed, and the owner has his title to his property the same as if no tax proceedings had been taken.* Where is the authority in such case

for the legislature to itself *transfer the title to his property to some one else?* If it be proper that he should pay the tax, the legislature might itself tax him, giving him opportunity to be heard in some way *before he must pay as to the amount for which he was liable* (Spencer v. Merchant, 100 N. Y. 585; 125 U. S. 345), or it could provide for further proceedings in order that *a legal tax might be levied, but by no form of words could it legally transfer the title of the owner to his property to some third person.*"

Cromwell vs. MacLean, 123 N. Y., 474, pp. 489–491.

E. In examining briefly the cases relied upon by the Government we will first consider the cases decided by this Court and then the State Court cases adduced.

The first class are all very well known and oft-cited cases, many, if not all of them, having been discussed at this bar in the Warner-Barnes case. They are:

Calder vs. Bull, 3 Dallas, 386.
Satterlee vs. Matthewson, 2 Pet., 380.
Hamilton vs. Dillin, 21 Wall., 73.
Mattingly vs. District of Columbia, 97 U. S., 687.
National Bank vs. Yankton, 101 U. S., 129.
Comanche Co. vs. Lewis, 133 U. S., 198.
Street vs. United States, 133 U. S., 299.

The case of *Calder vs. Bull* can have no relevancy here. The decision was placed by all the Justices upon two grounds:

(1) Under the law and usages of Connecticut the Legislature had a general judicial power of review;

(2) The prohibition against the passage of *ex post facto* laws related only to legislation of a penal nature.

The latter was the only constitutional limitation invoked, since, prior to the passage of the Fourteenth Amendment there was nothing to inhibit State legislatures from enacting laws "taking property without due process," unless thereby the obligation of a con-

tract were impaired. As there was in the case no question of contract, the "impairment" of contract clause could have no bearing. The situation was admirably summed up by Mr. Justice CUSHING in an opinion of civilian terseness and brevity (p. 400):

> "If the act is a judicial act, it is not touched by the Federal Constitution, and if it is a legislative act, it is maintained and justified by the ancient and uniform practice of the State of Connecticut."

That the Court felt little tenderness toward such laws as the one at bar even at that time is manifest from the expression of Mr. Justice PATTERSON, himself one of the "Framers" (p. 397):

> "I had an ardent desire to extend the provision in the Constitution (as to *ex post facto* legislation) to retrospective laws in general. There is neither policy nor safety in such laws; and therefore I have always had a strong aversion against them. It may in general be truly observed of *retrospective laws of every description, that they neither accord with sound legislation, nor the fundamental principles of the social compact.* But on full consideration, I am convinced that *ex post facto* laws must be limited in the manner already expressed; they must be taken in their technical, which is also their common and general acceptation, and are not to be understood in their literal sense."
>
> *Calder vs. Bull*, 3 Dall., 386, 397.

This Court has always treated that case as turning upon the question as to whether the legislation was *ex post facto*. It is the leading case on the subject.

> *Hawker vs. New York*, 170 U. S., 201.
> (Dissenting opinion of Mr. Justice HARLAN.)

That the decision may be equally sustained as a mere modification of remedial rights, recent expressions of this Court clearly show.

In *Stephens vs. Cherokee Nation*, 174 U. S., 445, 478,

the Honorable Chief Justice, delivering the opinion of the Court, says citing *Calder vs. Bull* and other cases :

> " And while it is undoubtedly true that legislatures cannot set aside the judgments of Courts, compel them to grant new trials, order the discharge of offenders, or direct what steps shall be taken in the progress of a judicial inquiry, the grant of a new remedy by way of review has been often sustained under particular circumstances."

Again it said referring to the action of a State in making laws affecting judicial proceedings :

> " *Prior to the adoption of the Fourteenth Amendment*, the power to provide such remedies although they may have interfered with what were called vested rights, seems to have been fully conceded. The cases in which this has been decided in this court are *Calder v. Bull*, 3 Dallas, 386 : *Satterlee v. Matthewson*, 2 Pet., 380 ; *Sampeyrean v. The United States, Watson v. Mercer*, 8 Pet., 88 ; *Finborn v. Smith*, 2 Wall., 160."
>
> *Freeland vs. Williams*, 131 U. S., 405, 420.

Hamilton vs. Dillin (21 Wall., 73) has been so fully discussed both in the briefs and at the bar in the Warner-Barnes case that we hesitate to again attempt to analyze it. Sufficient to say that the regulations there in question were held to be fully within the scope of the Presidential war power. As a makeweight the act directing that the moneys arising " from the fees collected under the rules and regulations made by the Secretary of theTreasury " be paid into the National Treasury was a recognition by the Congress of the power of the President.

> " It will be observed that the law was prospective, *relating to moneys thereafter to be received*, as well as to those already received. This was clearly an implied recognition and ratification of the regulations so far as any ratification on the part of Congress may have been necessary to their validity."

It may be incidentally observed that the ratification in question was a law of precisely the same character as that claimed to validate the exactions sued for in *DeLima vs. Bidwell*, and which this Court held could not take away the plaintiff's right to recover his moneys.

No question of expropriation was argued or invoked, the whole case turning upon the power of the President.

> "It is hardly necessary, under the view we have taken of the character of the regulations in question, to discuss the question of the constitutionality of the act of July 13, 1861, regarded as authorizing such regulations. As before stated, the power of the Government to impose such conditions upon commercial intercourse with an enemy in time of war as it sees fit is undoubted."

The only three cases cited in the opinion are *Cross vs. Harrison*, *Leitensdorfer vs. Webb*, and *The Grapeshot*, a fairly clear indication of what the real question at issue was. *Nor was "the taking without due process" raised in the argument of counsel* whose names are enough to indicate that any pertinent point would scarcely have escaped attention.

As regards *Satterlee vs. Matthewson*, what has been said as regards *Calder vs. Bull* is equally applicable:

> "If the effect of the statute in question be not to impair the obligation of either of those contracts, and none other appear upon this record,—is there any other part of the Constitution of the United States to which it is repugnant? It is said to be retrospective. Be it so, but retrospective laws which do not impair the obligation of contracts or partake of the character of *ex post facto* laws, are not condemned or forbidden by any part of that instrument. All the other objections which have been made to this statute admit the same answer. There is nothing in the Constitution of the United States which forbids the legislature of a State to exercise judicial functions. * * *
>
> "The objection, however, which was most pressed upon the Court and relied upon

by the counsel for the plaintiff in error was that the effect of the act was to divest rights which were vested by law in Satterlee. There is certainly no part of the Constitution of the United States which applies to a State law of this description, nor are we aware of any decision of this or any Circuit Court which has condemned such a law upon this ground; provided its effect be not to impair the obligation of a contract." (*Satterlee vs. Matthewson*, 2 Pet., 412.)

The case of *Baltimore & Susquehanna R. R. Co. vs. Nesbit*, 10 How., 395, was decided upon a similar theory.

The wisdom of later generations has added as limitations upon the powers of the State those which already existed as regards the Federal Government. Thus the old cases even if not otherwise easily distinguishable can have no relevancy to the question at bar nor be considered in conflict with *De Lima vs. Bidwell* (p. 199).

> "Before this amendment and the Thirteenth
> " were adopted, the States had supreme authority
> " over all these matters, and the National Govern-
> " ment, except in a few particulars, could afford
> " no protection to the individual against arbitrary
> " and oppressive legislation."
>
> *Bartemeyer vs. Iowa*, 18 Wall., 129, 140.

> "The Fourteenth Amendment * * * for
> " the first time authorized the former (*i. e.*,
> " Federal Courts) to declare invalid all law and
> " judicial decisions of the State abridging the
> " rights of citizens or *denying them the benefit of*
> " *due process of law.*"
>
> *Holden vs. Hardy*, 169 U. S., 366, 382.

The proposition that neither the Federal Government at any time nor a State since the Fourteenth Amendment can take property without due process

under the guise of the taxing power is made clear in four recent decisions of this Court.

Norwood vs. Baker, 172 U. S., 269.
French vs. Barber Asphalt Co., 181 U. S., 324.
Wight vs. Davidson, 181 U. S., 371.
Tonawanda vs. Lyon, 181 U. S., 389.

These cases are too familiar to require statement. They recognize the principle as settled that while the Fourteenth Amendment does not change the general taxing system in vogue in the various States these systems must not be so applied as to be inconsistent with the due process clause.

In the *Tonawanda* case this Court said of the case of *Norwood vs. Baker*, setting aside a special assessment on the ground that it was confiscatory :

> " It was not the intention of the Court, in that case, to hold that the general and special taxing systems of the States, however long existing and sustained as valid by their Courts, have been subverted by the Fourteenth Amendment of the Constitution of the United States.
>
> " The purpose of that Amendment is to extend to the citizens and residents of the States the same protection against arbitrary State legislation, affecting life, liberty and property, *as is afforded by the Fifth Amendment against similar legislation by Congress* " (181 U. S., 391-2).

In *Wight vs. Davidson*, Mr. Justice HARLAN said (181 U. S., 387) :

> " It is inconceivable to me that the question whether a person has been deprived of his property without due process of law can be determined upon principles applicable under the Fourteenth Amendment but not applicable under the Fifth Amendment. It seems to me that the words ' due process of law ' mean the same in both Amendments."

In the case of *Street vs. United States*, 133 U. S., 299, Congress had ratified certain acts of the President in reducing the army. As this was a public matter involving no question of property rights we fail to see what relevancy this decision can have.

(*F*) The case of the *National Bank vs. County of Yankton*, 101 U. S., 129, 135, was the common case of validation by legislative act of bonds issued by the local authorities without proper compliance with the statutory prerequisites.

Persons having parted with money on the faith of the bonds it seems but fair and equitable that the legislature or in a proper case Congress should make them good. A municipal corporation is simply a political subdivision of the State, possessing certain delegated power. If in using this power it created against itself claims irrefragable in morals but which may be legally uncollectible by reason of technical defenses, it is eminently just and proper that the State should refuse to allow its agent to take advantage of such technicality. Not only this does not partake of the nature of confiscation, but on the contrary it is based on the theory of restitution, as sound in law as in morals.

> "A city is only a political subdivision of the State, made for the convenient administration of the Government. * * *
>
> In directing, therefore, a particular tax by such corporation and the appropriation of the proceeds to some special municipal purpose, the legislature only exercises a power through its subordinate agent which it could exercise directly; and it does this only in another way when it directs such a corporation to assume and pay a particular claim not legally binding for want of some formality in its creation, but for which the corporation has received an equivalent."
>
> *New Orleans vs. Clarke*, 95 U. S., 644, 645.

> "It is not necessary to say in this case that the legislature had the power to donate the funds of the municipality for purposes of charity alone.

> The facts show plain moral grounds for the act, a consideration existing in the benefits received and enjoyed by the city or its by predecessors from whom it took such benefits."
>
> *Guthrie National Bank vs. Guthrie*, 173 U. S., 528, 537.

The distinction between validating bonds and legislating the property of A over to B is stated by Judge COOLEY with great nicety:

> "But in such cases (*i. e.* invalid bond issue) there is commonly a general power to incur town liabilities, and the particular debt is not void *for want of power to act upon the subject*, but because the power conferred is so restricted as not to embrace it. There is room for saying therefore that the case is one rather of irregularity than of want of jurisdiction. What is more important is, that in such a case there is no adversary or respondent party; the town is acting for itself exclusively, and against no one. Where, however, the town proceeds to levy a tax without authority the case is different; it is then proceeding *in invitum* against individuals who would be entitled, if the proceedings were legal, to have notice and be heard in various stages. If the proceedings are unauthorized by law, no one is legally or morally bound to take notice of them, or can have a legal hearing in respect to them, and a retrospective affirmance would in effect establish valid claims without opportunity to be heard. It is not believed this is competent."
>
> *Cooley on Taxation*, Vol I., pp. 514–15, 3d ed.

Comanche Co. vs. Lewis, 133 U. S., 198, is a case of the same class as *National Bank vs. Yankton*, and the same reasoning applies to it as to the other numerous cases that might be cited along this line.

The case of *Mattingly vs. District of Columbia*, 97 U. S., 687, is again relied upon. It does not treat of any question of violation of the fifth amendment. The statute in question did not do anything more than correct irregularities and adopt as its own the prior assessment made without sufficient authority. The

question of the power of Congress to legislate for the district was discussed, the Court holding the act good, because (p. 690):

> "It (Congress) may, therefore, cure irregularities and confirm proceedings which, without the confirmation, would be void, because unauthorized, provided such confirmation does not interfere with intervening rights."

The procedure was by a bill in equity to restrain the collection of the sums assessed.

Congress by its adoption of the tax made it impossible for the property owner to maintain his injunction, since at the time of trial there was a valid assessment made by act of Congress, the ratifying act, under which the commissioners could lawfully act. In so doing, therefore, no element of a tortious or wholly *extra jurisdictional* character was involved.

G. The State Court cases on the subject of curative statutes are legion. We will make no attempt to cite them all nor to completely harmonize the various expressions in the opinions of the Courts as to the powers of the State legislature, each under its own Constitution, to validate assessments. The learned Court below has examined a number of them and classified them as follows (R., p. 17):

> "Most of these cases present the curative force of statutes applicable to the failure to comply with provisions of law relating to the assessment and collection of the tax, but where the tax itself was not fundamentally illegal; others, however, belong to an entirely different class and involve the right of the legislature to cure an entire want of authority of the tax executive to act at all; in other words by retrospection to create a tax which was not a tax before."

In addition to the cases cited by the Court of Claims as belonging to the first class may be added the following: They are authority for the proposition that a

a wholly *extra jurisdictional* act, such as was the exaction in this case, cannot be given retroactive force so as to divest property.

In *People ex rel Hayes vs. City of Brooklyn*, 71 N. Y., 495, 496, the Common Council attempted to make an assessment for certain improvements which could only be made upon petition of the land owners and after a resolution of the Board of Health or the Common Council, *acting as a Board of Health*, determining that the work was necessary. No such petition was presented and

> " the Common Council did not act as a Board of Health in relation thereto,"

as the law required.

The Legislature having passed an act confirming all assessments theretofore made and levying a tax in conformity therewith which was claimed to validate the assessments in question the Court of Appeals held (pp. 497–8) :

> " We are not called upon to determine in this " case how far the legislative power may be in- " voked and exercised to remedy *irregular and de-* " *fective* proceedings in the assessment of real " estate and it is quite sufficient to say that, so " far as this case is concerned, *there was no juris-* " *diction whatever, and for that reason the pro-* " *ceeding cannot stand.* The learned counsel for " the appellant insists that the language employed " clearly refers to assessments *de facto* as well as " assessments *de jure.*
>
> " It is not apparent how the alleged assessment, " which is absolutely void and of no effect what- " ever, *for want of jurisdiction in the authorities* " *who illegally attempted to impose it, can in any* " *sense be considered as a de facto assessment. It* " *is not in truth an assessment in any respect.* " *Cannot be enforced or collected as such in any* " *lawful manner, and does not possess a single ele-* " *ment of life or vitality. It utterly fails for want* " *of jurisdiction, and cannot be upheld upon any* " *legnl ground.*"

This rule is the settled law of the State of New York.

In *People ex rel. Nostrand vs. Wilson*, 119 N. Y., 515, it appeared that under a legislative power to lay out an assessment district the Common Council fixing such district included in the assessment property not within such district. The Court held (p. 519) that :

> " the point that no remedy is open to the relator
> " for the reason that the assessment has been con-
> " firmed by the Common Council, and that an
> " assessment where so confirmed is declared by
> " the Statute to be final and conclusive is not we
> " think well taken. This provision cannot be con-
> " strued as applying to a case where *the assess-*
> " *ment is utterly void and illegal, and without*
> " *jurisdiction*, People *ex rel.* vs. City of Brooklyn,
> " 71 N. Y., 495."

In all these cases the property was in existence, and new taxes might at any time have been imposed by the Legislature, as explained in the case of *Lennon vs. The Mayor* (55 N. Y., 361, *supra).* But in the case at bar, not only was there no subject matter in existence at the time of the passage of the so-called ratification act upon which the tax could fall, but the tax was not one upon property at all, but upon certain acts done years ago—viz., the bringing of goods from one point in the United States to another. In other words, it is now sought to penalize claimants for having in the past carried on trade between the Philippines and the United States.

Yet even were it possible to argue that the ratification in effect taxed the goods brought into the Philippines by the claimants the law would be equally invalid.

In the words of Mr. Justice HARLAN :

> " The difficulty is not met by saying that, gen-
> " erally speaking, the State when enacting laws
> " may in its discretion make a classification of
> " persons, firms, corporations and associations in
> " order to subserve public objects. For this

" Court has held that classification must always
" rest upon some difference which bears a reason-
" able and just relation to the act in respect to
" which the classification is proposed, and can
" never be made arbitrarily and without any such
" basis. *But arbitrary selection can never be justi-*
" *fied by calling it classification.*"

Connolly vs. Union Pipe Co., 184 U. S., 540, 560.

In the recent New York case of the *Matter of Pell*, 171 N. Y., 48, the Legislature attempted to specifically impose a transfer tax upon remainders vesting prior to June 30, 1885. The tax was held unconstitutional, at page 59 the Court says :

" The tax is, therefore, imposed upon a limited
" class of remaindermen, while others who have
" come into possession and enjoyment, by reason
" of the termination of the life estate long after
" the early date fixed of June 30th, 1885, are not
" taxed.

" The learned counsel for the appellant states a
" very apt illustration in his brief, as follows : ' We
" often hear it declared that the legislature may des-
" ignate watches and carriages as a class of property
" and subject the same to the payment of duties and
" taxes, *but would any one claim that a law, declar-*
" *ing that all watches or carriages which were pur-*
" *chased prior to June 30th, 1885, should be ap-*
" *praised and taxed, could be sustained upon the*
" *ground that such law merely designated a class of*
" *property for taxation'?*

" *Where the statute declares that the owners of a*
" *particular class of property, acquired at a particu-*
" *lar time, shall be taxed, it is equivalent to naming*
" *the owners of such property ; it is in no sense a gen-*
" *eral classification.*"

Yet this is precisely the virtue that the Government claims for the statute at bar. The statute is admittedly aimed at certain particular importers, who, at certain specified times, traded with the Philippines under the sanction of existing laws, and who having been unlawfully subjected to military exactions for so doing have

brought actions against the United States for the recovery of the sums taken from them.

In *App vs. Stockton*, 61 N. J. Law Rep., 520, 523, the Court in passing upon the effect of a curative tax act hold:

> "It need only be said, in answer to a contention made by counsel for the defendants, that the act, etc., can have no application as curative of this assessment. That act only provides against the setting aside of an assessment because of any irregularity or defect in form in assessing the same. In this case the improvment made was wholly unauthorized and the assessment is one which lacks any legal basis whatever."

The Supreme Court of Illinois have recognized this distinction in no ambiguous or qualified terms:

> "In all civilized governments, laws, impairing the validity of contracts and divesting the rights of property are considered unjust and odious. * * * In the case under consideration (a tax sale) the transaction was complete before the law was adopted, and the answer may have relied upon the defects, which are admitted to have existed, but are claimed to have been cured by the act of 22nd February, 1861.
>
> "To give it force, therefore, would be to transfer the property of the former owner, not by force of a valid and binding sale for taxes, but by the declared will of the legislature, that his title should pass from him, and vest in the purchaser at a tax sale which conferred no right. This the legislature have not the power to do, whether by direct or positive action or by rendering valid and binding, acts which were nugatory."
>
> *Conway vs. Cable*, 37 Ill., 82, 90.

Government counsel lay great stress upon three cases in State Courts, Iowa, Oregon and Pennsylvania. These cases are examined in the opinion below and require little comment here.

The first of those cases, *Nottage vs. City of Portland*, 35 Oregon, 539, clearly dealt with an irregularity rather than an absence of all jurisdiction. In any event the

case does not question the generally recognized distinction and the inquiry whether it properly applied the law can have no interest. The decision is based upon the proposition with which we have no quarrel that "such legislation (retrospective) has been held to be lawfully directed to the cure of irregularities in an assessment of property for taxation and the levy of taxes thereon."

In *Iowa R. R. Co. vs. Soper*, 39 Iowa, 112, the decision is not necessarily in conflict with the general principles elsewhere recognized, but the dicta are not in harmony with them. As those expressions seem to us inconsistent with the law in the other States and inconsistent with the decisions of this Court they require no further comment. Suffice it to say that in that case the assessing officers had jurisdiction of the subject matter of the tax which clearly distinguishes the case from the one at bar.

In *Grim vs. Weissenberg*, 57 Pa. St., 433, much relied upon by the Governmnt are found expressions which are characterized by the latest commentator on this class of cases as "dangerously near the border line of confiscation" (*Hamilton Special Assessment*, § 821, Note).

It may be observed, however, that the Commissioners who levied the tax originally had jurisdiction of the subject matter of bounties since they were bounty Commissioners. The expression of the Court as to other Pennsylvania cases may also be appropriate to this one. "The judicial current, indeed, for a long period ran riot in sustaining acts of legislation of the most extreme character," * * * "could take the property of A and give it to B, but in *Norman vs. Heist* repudiated such an idea." The latter is the case cited with approval in *De Lima vs. Bidwell* on this very point of ratification.

It would be a work of supererogation to cumulate authorities further. The State cases may be found classified, and digested in a most recent work: "Law of Special Assessments" by C. H. Hamilton, §§ 816 *et seq.*

FIFTH POINT.

THE SECTION OF THE ACT OF JUNE 30, 1906, UNDER CONSIDERATION IS IN SUBSTANCE AND EFFECT AN EX POST FACTO LAW PROHIBITED BY ARTICLE 1, SECTION 9 OF THE CONSTITUTION.

Regarding this enactment from the point of view of its result and without regard to its form, we find that it deprives claimants and others similarly situated of their property, of their money held by the United States.

The only two grounds upon which under a free government, the State can lawfully deprive any man, citizen or alien, of his property and appropriate it to the public use (without compensation) are, (*a*) by the imposition of taxes for the support of the government; (*b*) by the imposition of a fine or penalty as a punishment for the commission of a wrong.

This enactment cannot be sustained as we have shown as an exercise of the taxing power. We submit that in substance it imposes a fine, penalty or punishment upon claimants for having done an act lawful at the time it was done and one which they had the constitutional right to do freely without paying any penalty. Therefore the enactment while civil in form is penal in its nature and amounts to an *ex post facto* law within the decisions of this Court.

True, that the term *ex post facto* has reference to crimes and penalties, but the question is not of the form of the enactment but of its substance and effect.

What is the substance and effect of this act? The claimants are deprived of their property. Is not that a penalty, a punishment *in substance?* Could Congress on June 30, 1906, have *fined* these claimants in the amounts in suit for having brought their goods in from New York to Manila without the payment of duty for which they were not liable? Clearly not, for such a fine would have been *ex post facto.* Could Congress then

have *fined* the claimants the amount collected by the military authorities as duties for having brought goods from New York to Manila, as at the time they had the right to do freely under the existing laws? Clearly not—the fine would have been *ex post facto*, a penalty for having done an act innocent at the time it was done. But what is the difference in substance and effect between such a fine and this act now before us? The substance and effect are the same; the difference is in form and verbiage only.

But the prohibitions in the Constitution are not to be evaded by mere matter of form. These prohibitions annul every act by which the result which they were intended to prevent might be accomplished.

Thus in *Cummings vs. Missouri*, 4 Wall., 277, at page 325, this Court said:

> "The Constitution deals with substance, not "shadows. Its inhibition was leveled at the thing, "not the name. It intended that the rights of "the citizen should be secure against deprivation "for past conduct by legislative enactment, under "any form, however disguised. If the inhibition "can be evaded by the form of the enactment, its "insertion in the fundamental law was a vain and "futile proceeding. * * *
>
> "By an *ex post facto* law is meant one which im- "poses a punishment for an act which was not "punishable at the time it was committed; or im- "poses additional punishment to that then pre- "scribed; or changes the rules of evidence by "which less or different testimony is sufficient to "convict than was then required.
>
> "In *Fletcher vs. Peck*, 6 Cr., 137, Mr. Chief-Jus- "tice MARSHALL defined an *expost facto* law to be one "" *which renders an act punishable in a manner in* "*which it was not punishable when it was committed.* "" Such a law," said that eminent judge, "*may* "*inflict penalties on the person, or may inflict* "*pecuniary penalties which swell the public treas-* "*ury.* The legislature is then prohibited from "passing a law by which a man's estate, or any "part of it, shall be seized for a crime, which was "not declared by some previous law to render "him liable to that punishment. Why then

"should violence be done to the natural meaning " of words for the purpose of leaving to the legis- " lature *the power of seizing for public use the* " *estate of an individual, in the form of a law* " *annulling the title* by which he holds the estate. " *The court can perceive no sufficient grounds for* " *making this distinction.* This rescinding act " *would have the effect of an expost facto law.* It " forfeits the estate of Fletcher for a crime not " committed by himself, but by those from whom " he purchased. This cannot be effected in the " form of an *ex post facto* law, or bill of attainder; " why then is it allowable in the form of a law an- " nulling the original grant?"

" The act to which reference is here made was " one passed by the State of Georgia, rescinding a " previous act, under which lands had been " granted. *The rescinding act* annulling the title " of the grantees, *did not in terms, define any* " *crimes,* or *inflict any punishment,* or *direct any* " *judicial proceedings;* yet inasmuch as the legis- " lature was forbidden from passing any law, by " which a man's estate could be seized for a crime, " which was not declared such by some previous " law rendering him liable to that punishment, " the chief justice was of opinion that the rescind- " ing act *had the effect of an expost facto law and* " *was within the constitutional prohibition.*

" The clauses in the Missouri constitution, " which are the subject of consideration, do not, in " terms, define any crimes, or declare that any " punishment shall be inflicted but *they produce* " *the same result upon the parties against whom* " *they were directed as though the crimes were de-* " *fined and the punishment was declared.* * * *

" Now some of the acts to which the expur- " gatory oath is directed were not offences at the " time they were committed. It was no offence " against any law to enter or leave the State of " Missouri for the purpose of avoiding enrollment " or draft in the military service of the United " States, however much the evasion of such ser- " vice might be the subject of moral censure. " Clauses which prescribe a penalty for an act of " this nature are within the terms of the definition " of an *expost facto* law. They impose a punish- " ment for an act not punishable at the time it " was committed."

To the same effect is the opinion of this Court in *Ex parte Garland*, 4 Wall., 333.

See, also,

Ogden vs. Saunders, 12 Wheat., 213, 266.
Burgess vs. Salmon, 97 U. S., 381,
and *United States vs. Burr*, 159 U. S., 78, 84.

This point is well illustrated in the opinion below by Judge BARNEY (R., p. 18).

POINT SIXTH.

THE FACT THAT THE BENEFICIARY OF THIS ACT IS THE UNITED STATES AND NOT AN INDIVIDUAL MAKES THE ACT AT ONCE MORE OBNOXIOUS TO ETHICS AND NATURAL JUSTICE, AND MORE CLEARLY AN ACT OF CONFISCATION.

Aside from the requirements of the constitution this act violates every principle of ethics, common honesty, fair dealing and natural justice. We have here a debtor, the United States, which by reason of possessing the attributes of sovereignty cannot be sued without its consent, establishing a court for the express purpose of adjudicating the claims of its creditors and thereby inviting the subjects of all friendly nations to establish their claims; allowing further an appeal from that court to the Supreme Court of the United States. We have the Legislature of the United States providing for the payment of all claims adjudicated by these tribunals. We have a test case brought by a British subject (Warner, Barnes & Co., Ltd.) in which upon appeal this Court adjudges that the claim is valid; we then have the United States so adjudged a debtor petitioning this Court for a rehearing and urging that the case should receive most serious consideration because the decision of this Court in that case *would*

settle the law for many other pending claims including that of the German subject now before this Court, involving several millions of dollars; we have this Court granting a rehearing, an elaborate reargument of the questions involved and a reiteration of the statement by the counsel for the United States that these other claims all depend upon the judgment of this Court in the test case. This Court then announces its adherence to the conclusion already reached which is that the United States has received without right money belonging to the claimants and that it has impliedly agreed to return these moneys. The United States thus adjudicated to be in the debt *of all these claimants*, then passes an act by which it endeavors to repudiate this debt and to confiscate and appropriate to its own use this money.

In the interim, however, between the passage of this act and the argument of the case at bar, the United States has appropriated the money for the payment of the claim of Warner, Barnes & Co., Ltd., the British subject who was fortunate enough to obtain judgment before this act was passed, and the Honorable Secretary of War has gone before the Congress and stated that this judgment is a debt of honor which should be paid (General Deficiency Act of March 3, 1907; Report of Proceedings before House Committee in Appropriations).

Argument is not needed to demonstrate that this act of repudiation is utterly at variance with the fundamental principles upon which the Constitution is based. This Court has uniformly intimated that such an enactment would be held void.

In *Fletcher vs. Peck*, 6 Cr., 87, at 139, this Court, by Mr. Chief Justice MARSHALL, gives an instance of a palpably void act of the legislature which is in substance the very act now under consideration.

> " The Constitution, as passed, gave the Courts
> " of the United States jurisdiction of suits brought
> " against individual States. A State then which
> " violated its own contract was suable in the

" courts of the United States for that violation. " *Would it have been a defense in such a suit to say* " *that the State had passed a law absolving itself* " *from the contract? It is scarcely to be conceived* " *that such a defense could be set up.* And yet if a " State is neither restrained *by the general princi-* " *ples of our political institutions,* nor by the words " of the Constitution from impairing the obligation " of its own contract, such a defense would be a " valid one."

The case now before this Court is almost the very case supposed by the great Chief Justice, but stronger in that the repudiating State is the sovereignty which established the tribunal by which its liability on the contract was to be decided, and that this act has been passed after that tribunal has established its liability.

" It has been suggested, although this procla- " mation did not come into existence until the " 27th of June, that after it did take effect, it re- " lated back to the 24th of that month. *Such a* " *principle is unknown to our laws. It involves the* " *essential effect of a retroactive law.* That a man " should, on the 24th of June, perform an act law- " ful and commendable, that by an official declara- " tion on the 27th this lawful act should be ren- " dered unlawful at the time it was performed, and " punishable, is in violation of every idea of con- " stitutional law and of common right."

Dissenting opinion of Justices Hunt, Miller, Field & Bradley, *Lapeyre vs. United States,* 17 Wall., at 206.

In *Wilkinson vs. Leland,* 2 Pet., 627, an executrix appointed in New Hampshire sold by direction of the Probate Court of that State certain lands in Rhode Island which had belonged to the testator, in order to pay the testator's debts, but without having had the will probated in Rhode Island. She then, in order to clear the title, procured the passage of an act of the Legislature of Rhode Island by which the title was

ratified. The heir of the devisee of the testator brought ejectment against the grantee of the grantee of the executrix. The debts in Rhode Island exceeded the value of the real estate. After pointing out that the only question in the case was as to the power of the Legislature of Rhode Island, and that there was no "Federal question" in the case and that at time Rhode Island had *no written constitution*, this Court, by Mr. Justice STORY said, at page 657 :

> "We know of no case in which a legislative act *to transfer the property of A to B without his consent has ever been held a constitutional exercise of legislative power in any State in the Union. On the contrary it has been constantly resisted as inconsistent with just principles*, by every judicial tribunal in which it has been attempted to be enforced," and at page 660 :
>
> "But it is said, that this is a retrospective act, which gives validity to a void transaction. Admitting that it does so, still it does not follow that it may not be within the scope of the legislative authority in a government like that of Rhode Island *if it does not divest the settled rights of property.*"

Chancellor KENT in his commentaries (1, 455) says :

> "A retrospective statute affecting and changing
> "vested rights is very generally considered in this
> "country as founded on unconstitutional princi-
> "ples and consequently inoperative and void."

If the ratification in the Act of June 30, 1906, is constitutional, we may well enquire if there is any limit to the power of legislation thus conferred by the application of the doctrine of ratification upon the President. A pertinent enquiry at the present time.

SEVENTH POINT.

THE JUDGMENT OF THE COURT OF CLAIMS SHOULD BE AFFIRMED.

April 8th, 1907.

JOHN G. CARLISLE,
PAUL FULLER,
FREDERIC R. COUDERT,
HENRY M. WARD,
Counsel for Appellees.

APPENDIX A.

59TH CONGRESS, 1ST SESSION. **S. 6362.**

IN THE SENATE OF THE UNITED STATES.

JUNE 5, 1906.

Mr. SPOONER introduced the following bill; which was read twice and referred to the Committee on the Judiciary.

A BILL

To approve, ratify, and confirm tariff duties levied and collected at all ports and places in the Philippine Islands between July twelfth, eighteen hundred and ninety-eight, and March eighth, nineteen hundred and two, and for other purposes.

Whereas in assumed compliance with an order of the President, dated July twelfth, eighteen hundred and ninety-eight, and subsequent amendments, a tariff of duties was levied and collected at all ports and places in the Philippine Islands upon all goods and articles of merchandise imported into the Philippine Islands from foreign countries and from the United States from July twelfth, eighteen hundred and ninety-eight, to March eighth, nineteen hundred and two; and

Whereas by the Act of July first, nineteen hundred and two, Congress, by the second section thereof, enacted that "the action of the President of the United States theretofore taken by virtue of the authority vested in him as Commander in Chief of the Army and Navy, as set forth in his order of July twelfth, eighteen hundred and ninety-eight, whereby a

tariff of duties and taxes, as set forth by said order, so to be levied and collected at all ports and places in the Philippine Islands upon passing into the occupation and possession of the forces of the United States, together with the subsequent amendments of said order, are hereby approved, ratified, and confirmed, and the actions of the authorities of the government of the Philippine Islands, taken in accordance with the provisions of said order and subsequent amendments are hereby approved; and

Whereas in a cause pending in the Supreme Court of the United States that court has decided that the language of section two of the Act of July first, nineteen hundred and two, above quoted, properly construed, only applies to such a tariff of duties levied and collected in the Philippine Islands before April eleventh, eighteen hundred and ninety-nine, and does not extend to and confirm and ratify such duties collected from July twelfth, eighteen hundred and ninety-eight, to March eighth, nineteen hundred and two; and

Whereas a claim for a refund of the duties levied and collected between the dates above mentioned, to wit, from July twelfth, eighteen hundred and ninety-eight, to March eighth, nineteen hundred and two, is inequitable in that the importers of such goods who are now claiming refunds in fact reimbursed themselves for the payment of the duties by the sale of such goods in the markets in the Philippines at prices which included the duties; and

Whereas *it was the intention of Congress*, although not properly carried into the language of the law, *to approve and ratify what has been done by the President and the officers of the Philippine Government* in the establishment and *collection of a tariff of duties* from July twelfth, eighteen hundred and ninety-eight, to March eighth, nineteen hundred and two: Now, therefore,

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That all duties levied and collected by the

authorities of the Philippine Islands, representing the governments of the Philippine Islands and of the United States, at all ports and places in those islands upon all goods and articles of merchandise imported into the islands from foreign countries and from the United States, from July twelfth, eighteen hundred and ninety-eight, to March eighth, nineteen hundred and two, are hereby approved, ratified, and confirmed as fully in all respects as if the same had been expressly authorized by an Act of Congress before their levy and collection: *Provided*, That this Act is not intended and shall not be held to apply to suits to recover duties collected and paid which have been already determined by the Supreme Court.

[ENDORSED.]

59TH CONGRESS, *1st Session.* **S. 6362.**

A BILL

To approve, ratify, and confirm tariff duties levied and collected at all ports and places in the Philippine Islands between July twelfth, eighteen hundred and ninety-eight, and March eighth, nineteen hundred and two, and for other purposes.

BY MR. SPOONER.

JUNE 5, 1906.—Read twice and referred to the Committee on the Judiciary.

APPENDIX B.

WARNER, BARNES & CO., LIMITED, AGAINST THE UNITED STATES.

LETTER FROM THE SECRETARY OF THE TREASURY, TRANSMITTING THE RECORD OF A JUDGMENT RENDERED BY THE COURT OF CLAIMS IN THE CASE OF WARNER, BARNES & CO., LIMITED, AGAINST THE UNITED STATES, IN THE AMOUNT OF $71,161.95, ETC.

JUNE 26, 1906.—Referred to the Committee on Appropriations and ordered to be printed.

TREASURY DEPARTMENT,
OFFICE OF THE SECRETARY,
Washington, June 25, 1906.

SIR: I have the honor to transmit herewith, for the consideration of Congress, the record of a judgment rendered by the Court of Claims on June 8, 1906, in cause No. 22757, Warner, Barnes & Co., Limited, *v.* The United States, in the amount of $71,161.95. A copy of the mandate of the Supreme Court of the United States, dated June 7, 1906, as certified by the Court of Claims June 8, 1906, accompanies this communication. An appropriation for the judgment is necessary before payment can be made. Attention is invited, however, to the fact that the moneys sued for and recovered in this cause represent duties exacted from plaintiffs upon merchandise shipped by them from New York to Manila and landed at the latter port between April 11, 1899, the date when the ratifications of the treaty with Spain were exchanged and the treaty proclaimed, and October 25, 1901. The duties were levied under an order of the President dated July 12, 1898, and were paid into the Treasury

of the Philippine Islands, and no part of such moneys ever reached the Treasury of the United States.

Respectfully,
L. M. SHAW,
Secretary.

The PRESIDENT OF THE SENATE.

COURT OF CLAIMS.

WARNER, BARNES & CO., *v.* THE UNITED STATES.
No. 22757.

I, JOHN RANDOLPH, assistant clerk Court of Claims, hereby certify that the annexed is a true copy of the mandate of the Supreme Court of the United States filed in this office June 8, 1906, in the above-entitled cause.

In testimony whereof I have hereunto set my hand and affixed the seal of said court at Washington City this 8th day of June, A. D. 1906.

JOHN RANDOLPH,
[SEAL.] *Assistant Clerk Court of Claims.*

UNITED STATES OF AMERICA, *ss :*

The President of the United States of America to the honorable the judges of the Court of Claims, greeting:

Whereas lately in the Court of Claims before you or some of you, in a cause between Warner, Barnes & Company (Limited), claimant, and the United States, defendant, No. 22757, wherein the judgment of the said Court of Claims, entered in said cause on the 5th day of May, A. D. 1904, is in the following words, viz:

The court on due consideration of the premises find for the defendants and do order, adjudge, and decree that the petition of the claimants, Warner, Barnes & Company, Limited, be and the same is hereby dismissed.

BY THE COURT.

as by the inspection of the transcript of the record of the said Court of Claims which was brought into the Supreme Court of the United States by virtue of an appeal agreeably to the act of Congress in such case made and provided, fully and at large appears.

AND WHEREAS in the present term of October, in the year of our Lord one thousand nine hundred and four, the said cause came on to be heard before the said Supreme Court on the said transcript of record and was argued by counsel:

On consideration whereof, It is now here ordered and adjudged by this court that the judgment of the said Court of Claims in this cause be, and the same is hereby, reversed.

And it is further ordered that this cause be, and the same is hereby, remanded to the said Court of Claims for further proceedings, in conformity with law.

APRIL 3, 1905.

You, therefore, are hereby commanded that such further proceedings be had in said cause in conformity with the opinion and judgment of this court as according to right and justice and the laws of the United States ought to be had, the said appeal notwithstanding.

Witness the Honnorable MELVILLE W. FULLER, Chief Justice of the United States, the 7th day of June in the year of our Lord one thousand nine hundred and six.

[SEAL.] JAMES H. MCKENNEY,
Clerk of the Supreme Court of the United States.

Judgment Rendered by the Court of Claims.

No.	Name of claimant.	Date of Judgment.	Amount.	When presented for payment.	When payable if not appealed.
22757	Warner, Barnes & Co., Limited.	June 8, 1906	$71,161.95	June 8, 1906	Sept. 6, 1906

APPENDIX C.

OFFICE OF THE ATTORNEY-GENERAL,
WASHINGTON, D. C., June 26, 1906.

MY DEAR JUDGE CRUMPACKER: Secretary Taft has brought to my attention the letter which he wrote to you, under date of June 25, concerning the proposed legislation ratifying the collection of duties in the Philippines between the date of the exchange of the ratifications of the treaty and the imposition of a tariff by Congressional authority. I did not argue the case in the Supreme Court when it was originally submitted, but I did move for a rehearing, and applied for leave to argue the case orally, and then made an oral argument. I send you a copy of that argument, which you probably can not at this time read.

I agree with the statement of the case by the Secretary of War. I can not have the slightest doubt that it was the intention of Congress to have ratified the collection of those duties in the original ratifying act, but of course I submit cheerfully to the opinion of the majority of the court to the contrary. These claims are highly inequitable, and it seems to me that it is the duty of Congress to protect the Government against all claims of this class except those which have gone to judgment. In the absence of legislation, I should fear the result of any case brought to recover duties collected during this period on goods coming from all foreign countries, for it would be difficult within the reasoning of the court to contend that the validity of the order imposing the duties did not cease with the war with Spain. Of course, goods coming from Spain during this period are entitled by the treaty to come in upon an equality with goods coming from the United States.

There was no agreement made by this Department, with which I am aware, that the cases in the Supreme Court should be regarded as conclusive of any other cases.

I send this hasty note to you at the request of Secretary Taft.

Sincerely, yours,

W. H. MOODY.

HON. EDGAR D. CRUMPACKER,
Committee on Insular Affairs, House of Representatives.

APPENDIX D.

WAR DEPARTMENT,
WASHINGTON, June 25, 1906.

MY DEAR JUDGE CRUMPACKER: I am very anxious to secure the passage of an act at this session of Congress which shall ratify and legalize the collection of duties, export and import, collected in the Philippine Islands by the provisional military government established by President McKinley and continued under President Roosevelt prior to March 8, 1902, when Congress passed its first Philippine tariff act.

The duties collected between April 11, 1899, the date of the ratification of the treaty of cession, and March 8, 1902, must have aggregated at least $15,000,000 gold. This sum was expended in furnishing a government for Manila and the islands and in public improvements. It was paid chiefly by large importers and exporters who sold their goods at profitable prices including the duties paid, and who enjoyed the benefit and protection of the government which the taxes were expended to support. The money paid as duties never came into the Treasury of the United States at all.

After the insular decisions, in which it was held that the Philippine Islands were territory belonging to the United States, in which the President as Commander in Chief has no power to impose duties on merchandise imported from the United States, Congress passed a law approved July 1, 1902, in the second section of which it was supposed by the War Department that Congress had ratified the duties collected in the islands prior to March 8, 1902. Section 2 is as follows:

"SEC. 2. That the action of the President of the United States heretofore taken by virtue of the authority vested in him as Commander in Chief of the Army and Navy, as set forth in his order of July 12,

1898, whereby a tariff of duties and taxes as set forth by said order was to be levied and collected at all ports and places in the Philippine Islands upon passing into the occupation and possession of the forces of the United States, together with the subsequent amendments of said order, are hereby approved, ratified, and confirmed, and the actions of the authorities of the government of the Philippine Islands, taken in accordance with the provisions of said order and subsequent amendments, are hereby approved: *Provided*, That nothing contained in this section shall be held to amend or repeal an act entitled 'An act temporarily to provide revenue for the Philippine Islands, and for other purposes,' approved March 8, 1902."

Before the passage of this act of July 1, 1902, suits had been brought by certain importers against the United States in the circuit court of the United States and in the Court of Claims to recover back duties paid in the Philippines after April, 1899, and prior to March 8, 1902. The United States defended on many grounds, the main one being that there was a state of war due to the insurrection between the two dates which justified the imposition of such taxes as a military exaction, and another being that even if the taxes were illegal when imposed and collected, they were made legal by the ratification of them by Congress in section 2 of the act of July 1, 1902, above quoted.

The Court of Claims upheld the first defense of the United States above stated, to wit, that there was, when the taxes were levied and collected, a state of actual war, in which they were justified as a military exaction, and so did not find it necessary to pass on the question of ratification. The two cases were appealed to the Supreme Court by the claimants, and that court decided that there was no such state of war in the Philippines as to justify the holding of the Court of Claims, and further held that section 2 of the act of July 1, 1902, did not in fact ratify and confirm the duties collected between April 11, 1899, and March 8,

1902, because by its terms it only ratified duties collected in pursuance of the Executive order of President McKinley of July 12, 1898, and subsequent amendments; that the order of July 12, 1898, was a war order, intended to be effective only during the war with Spain, and duties collected after the treaty of peace could not be said to be collected in pursuance of that order, and were, therefore, not within the ratification of the section relied upon.

The result of the decision of the Supreme Court was to increase greatly the number of claims filed in the Court of Claims, so that the aggregate amount claimed amounts to three and one-half millions gold.

A petition for rehearing was filed in the Supreme Court by the Attorney-General urging that an error had been made by the court in failing to not that while the original order of July 12, 1898, might have been limited to the period before the treaty of peace, the section included not only duties collected in pursuance of the original order of July 12, 1898, but also those collected in pursuance of amendments to the order, and that one or more of the amendments were made after the treaty of peace. The petition for rehearing was granted for argument solely on the point whether Congress had ratified the collection of the duties collected and now sought to be recovered. On the rehearing, the court, which had been unanimous in the first hearing divided, a majority affirming their previous decision, while Mr. Justice WHITE and Mr. Justice MCKENNA dissented, expressing the opinion that Congress had ratified the collection of the taxes sought to be refunded and that, as there was no doubt about the power of Congress to ratify, the judgment should be against the claimants. The duties sought to be recovered in these suits are only those imposed on goods coming into the Philippines from the United States; but if the collection of duties on goods coming from the United States was illegal, it is difficult to see how duties imposed by the same authority on goods coming from foreign countries were not equally unauthorized

and illegal and why export duties were not also beyond the power of the Philippine authorities to collect.

In other words, there is very grave danger that under the decision of the Supreme Court and its construction of section 2 of the act of July 1, 1902, claims may be successfully presented and judgment obtained for the whole fifteen millions or more collected and expended in governing the Philippines for two years, so that this burden shall be saddled on the United States, to reimburse the persons who have already reimbursed themselves for the duties they paid in the prices at which they sold the imported or exported merchandise, and who have enjoyed the two years of protection that the Government which these duties supported afforded them. There is, therefore, not the slightest real equity existing in favor of these claimants, and it is right and just that if Congress can by curative legislation in any way defeat these claims, it should do so.

You, who were cognizant of the purpose of the act of July 1, 1902, know that it was the intention of the second section of that act to confirm and legalize the collection of these very duties, but the language selected must have been unfortunate. The court say in its opinion, in effect, that Congress might have used language specifically ratifying these duties, and because it did not do so and used doubtful language, it would construe the section strictly and hold that Congress did not thereby intend to ratify these duties. It seems to me, therefore, that Congress may properly now ratify specifically these duties and come up to the measure set by the court.

It is argued that this proposed act is beyond the power of Congress because it defeats vested rights. If that be true, why did the court consider the question of ratification at all? Why did it give a rehearing on the question whether Congress had in fact ratified the collection of the taxes? Why did it not invite a hearing on the question whether Congress could ratify, and if there were no power to ratify, base its decision on

that conclusive ground? The truth is that the Supreme Court in the case of Hamilton *v.* Dillon (21 Wall., 73), has expressly upheld the power of Congress to ratify taxes collected without authority. The claimants have all along contended that the case of De Lima *v.* Bidwell (182 U. S., 1) was an authority for the proposition that retroactive legislation of this character, especially after suit brought, was unconstitutional. There was in that case *an obiter dictum by Justice Brown*, that after suit brought, it would seem that right to recover duties illegally paid could not be divested by curative or retroactive legislation.

The decision in De Lima *v.* Bidwell, however, was put on a different ground. It is full of significance that if *Justice Brown's dictum had been recognized as law by the court* it would have furnished a conclusive reason for deciding the cases just decided against the United States without any regard to the intention of Congress to ratify the collection of the duties involved, because, as already stated, the act of July 1, 1902, relied on for ratification, was passed after the claims before the court had been filed in the Court of Claims; and yet the court in these cases, not only in its original decision, but also in its order granting a rehearing, and also in its second decision, made the question whether Congress had intended by section 2 of the act of July 1, 1902, to ratify the collection of these duties, the turning point of the case. De Lima *v.* Bidwell, *supra*, is cited by the Supreme Court in the decisions in the present cases not for the point relied on by the claimants, which, as I have said, would have been conclusive and foreclosed all necessity for considering the question of ratification, but merely to the point that the court will strictly construe retroactive legislation of this character.

The mere fact of bringing a suit does not change the nature of a right. If vested before suit, it is vested afterwards. If capable of being lawfully divested before suit, it may be lawfully divested after suit brought. A judgment, of course, changes the nature of a right so that it can not be divested, but until judg-

ment, ratification may take effect. The proper limit to ratification is this, that the depository of authority may ratify any act done by one assuming authority without warrant, and validate the act as against a third party if meantime, *i. e.*, between the act and the ratification, the third party affected has not changed his situation to his injury so as to make the validation of the act inequitable. How have the claimants here changed their situation to their injury in any way by the mere filing of the suits in the Court of Claims? As already said, this proposed act could not invalidate judgments already entered, and does not do so, but it may affect, and ought to affect, pending causes, and it will affect, and ought to affect, the myriad of claims that will be filed hereafter in order to enable the importers and exporters of the islands, most of them foreigners, to eat their cake and have it, too—to collect the duties from the consumers in the prices charged on the one hand, and to collect the duties again from the United States on the other, and also to enjoy the protection of the Government supported by these duties.

If this proposed act is invalid because it attempts to defeat vested rights, a view which the course of the court in these cases does not sustain, then the claimants will not be affected injuriously by it, for it would not prevent the court from giving judgment for the claimants on any of these claims. On the other hand, if the proposed act is within the power of Congress, there is not the slightest doubt of its duty to protect the Government against such inequitable claims by such curative legislation.

I inclose copies of the two opinions of the Supreme Court and the petition of the Attorney-General for rehearing.

Sincerely yours,

WM. H. TAFT.

Hon. EDGAR D. CRUMPACKER,
Committee on Insular Affairs,
House of Representatives.

[31967]

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FILE COPY.

No. 580.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1906.

Office Supreme Court, U. S.
FILED.
APR 16 1907
JAMES H. McKENNEY,
CLERK

THE UNITED STATES,
Appellants,

vs.

CONRAD HEINSZEN and GUSTAV BROCKMANN, Trading as HEINSZEN & Co.,
Appellees.

Oral Arguments of Mr. Coudert and Mr. Ward and Questions by the Justices.

HENRY M. WARD,
Attorney for Appellees,
32 NASSAU STREET,
New York City.

FREDERIC R. COUDERT,
Counsel.

C. G. Burgoyne, Walker and Centre Streets, N. Y.

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In the Supreme Court of the United States.

THE UNITED STATES,
Appellants,

vs.

CONRAD HEINSZEN and GUSTAV BROCKMANN,
Appellees.

APRIL 11, 1907.

Argument of Mr. Frederic R. Coudert.

If the Honorable court please : I regret to have received a telegram a few hours ago from Mr. John G. Carlisle, stating that he was very ill and would not be able to be present and take part in the argument, as he expected to do. He has been suffering a great deal for some time past. This of course will leave the claimants hopelessly overweighted by the great array of legal talent on the part of the Government ; and if we did not have two decisions in our favor on precisely the same state of facts, we might feel considerably worried in the premises. However, we believe that the doctrine of *stare decisis* is the law of the land.

Embarrassment, I presume, is a state of mind, which no lawyer ought ever to admit, however often he may feel it ; but I confess some little embarrassment in this case, coming here to argue before this great and learned court upon what must necessarily be the same state of facts upon which we argued before ; I fear

very much that if I should argue for any length of time I should become hopelessly tedious and repetitious. The case might have been interesting the first time; it was probably dull the second time, but it must be a hopeless bore the third time.

There are two questions raised here, which we have argued at the bar three times before, as the record in this case will show. They are, first, the contention that there was no protest, hence no recovery, and, second, that the recent Act of Congress apparently interpreting the other Act of Congress now bar us out of court after our actions are brought.

As to the first question, if your honors please, the question of protest, it is not necessary to say a great deal upon that. Your honors will notice when they look at the records in the Court of Claims, that this case was argued by Mr. Magoon, now Governor General of Cuba. He submitted a dignified brief of 200 pages and made a proportionately dignified oral argument, and in closing he submitted a special brief at the request of the honorable Secretary of War, who deemed the case very important. The case came to this court and was argued by the learned Solicitor General. I have felt his blade often, and nobody knows its keenness better than I. Then by the Attorney General of the United States, now Mr. Justice MOODY—and yet we are told with a certain appearance of gravity and solemnity almost persuasive, that the question of protest was not raised, discussed, argued and disposed of, although one of those plain and elementary questions in a case of this kind that, as the French say, jump into your eye, so that you cannot see anything else. Now, that would be a very extraordinary indictment of all the legal talent which the Government has been able to array against us, and which has subsequently been exalted into such lofty positions, were it not for the fact that the record shows these gentlemen have apparently forgotten what really did take place. I sent up to one of the Justices, in reply

to a query on his part, the record of the opinion in the Court of Claims, in which it is stated that the payments in this case were deemed voluntary by the Court of Claims. When case came here, and that opinion was before the court, a part of the record, was presumably read, I judge from what the learned Justice said a moment ago actually read. Then my learned friend, Mr. Hoyt, in one of the arguments—I do not care which, but in one of the arguments and before the final decision was rendered, argued the question of protest with great fullness and ability, and Mr. Butler, the reporter of the court was so much impressed with it, that he gave half a page of these valuable records of the court to Mr. Hoyt's argument. And we are told, under all these circumstances, that because this honorable court did not deem it wise to devote several pages to the matter, it was evidently overlooked and not decided! That is a proposition which I would not venture to argue any further, the less serious part of one's nature might get the better of one, and your honors would be tempted to look at it from a humorous standpoint. Enough for that.

Now, as to the question of protest on the merits. Was it, after all, so very extraordinary that the court did not find it necessary to write many pages on the subject? The situation was plain in the Warner Barnes case. In this case the circumstances, the facts, the incidents, the surroundings, were precisely the same. In the Warner Barnes case the court found the facts. In this case, there was an agreed statement of facts. I have placed them in the deadly parallel column, and there is no difference whatever. I believe every comma on each side is in its corresponding place.

The situation was simply this, as found as a fact there and as shown by the statement here, that when these goods came into the Philippine Islands, a guard of soldiers went on board of the vessels and took possession of them and we could not get them without the payment of the duty. Now, I take it, that the word *protest* is not one of mystic significance; it is a per-

fectly plain straight matter of common law. Whether a payment is voluntary or not depends upon the state of mind of the actor. A payment may be of two kinds; it may be an involuntary payment or it may not be. My friend cited cases to show that payments were held to be voluntary where the individual protested but the circumstances were such that it was evident his protest was merely a sham and he meant to give the money willingly. On the other hand, the circumstances of duress may be such that whether there be evidence of protest or not is a matter of indifference, because the circumstances make out the duress. In this case our client went on board his ship and found his goods under the fostering care of menacing Krag-Jorgensen rifles, and I presume the new style of very deadly bayonet. Can it possibly be presumed by any reasonable individual that in paying this money under these circumstances he was actuated by a desire to donate sums of money to the Government for the betterment of his people and of mankind generally? Possibly so extraordinary a supposition might be indulged in in the case of an American citizen. It is hardly possible that a subject of Emperor William could be actuated by such considerations, even under the potent persuasion of the aforesaid Krag-Jorgensen rifles. Therefore, it seems to me, that the decision of the court was not so extraordinary, and that it is more probable to assume that they dismissed it without thinking it necessary to write an opinion about it, rather than that they overlooked it in the opinion of the Court of Claims, or in the learned argument of my friend, Mr. Hoyt. That certainly would be an extraordinary assumption. I take it, if your honors please that possibly there may be some little confusion on the point by reason of the three elementary senses in which the word "protest" is used. Protest is merely evidence of an involuntary payment. I presume that if I should at the close of the argument, take up my bag, which I expect to do peaceably and depart as soon as this

argument is over, and I found a gentleman accoutred in the new uniform of the United States, with a bayonet and rifle at hand, who told me he would pass a bayonet through my person unless I gave him a dollar, and I gave him a dollar, it would be difficult to construe me into a cheerful giver, but rather would I be supposed to have paid by reason of the fostering influence of the aforesaid bayonet. The circumstances here were of course precisely similar, and, therefore, the decision of the court was natural. Now, where a little bit of confusion has been raised, at any rate possible in the minds of this court who have decided these cases, is here. Protest has been used in three senses. It has been used in the sense of notice to an agent to warn him not to pay over the money to a principal, as if he should pay it over under those circumstances, then in an action for money had and received, which is nothing but a bill in equity filed at law, it would be against conscience for the plaintiff to force the agent to pay back the money, he not having notified him not to pay it to his principal. The law is stated in the case of Cary vs. Curtis. That of course has no relevance here, because the Government directly took the money, and we are not suing the officer, and protest in the sense of notice of dissatisfaction does not arise at all. Protest is used in a third and statutory sense, that is, that you must make an appeal to the Government under the Customs and Administrative Act, within ten days after bringing in your goods—at any time within ten days. Now, if statutory protests were meant, clearly the protest would have to be at or before the time of taking of the goods, because any later action of the individual to make for himself a case could have no force. That would seem clear, but statutory protest is simply for the protection of the Government, and has been said to be in the nature of an appeal under the Customs Administrative Act, and when we get in the port of New York, and within ten days after do not file some such statement, we have then violated the statute, and are not entitled to our remedy

under the Customs and Administrative Act by going before the board of general appraisers. It is useless to say again what has been repeated so often, that the nature of this case and all these cases is that they are not customs cases at all, and my friend cannot say we should have appealed from one military officer to another military officer in Manila, and proceeded under the regulations. It is not a customs case at all, but is a case where the Collector acted outside of the functions of his office and seized our goods, we had a choice of remedy, to sue him in the State courts, or to proceed as was done by my associates in the Dooley case, under the Tucker Act, and sue the Government in the Court of Claims, because they had received the money directly. Therefore, no question of protest in the sense of notice and no question of protest in the sense of appeal can arise. My friends have cited a case which is interesting, not so much because it is relevant as because it shows an unusual phase of human nature. It is the case of Dewell vs. Mix, the only one which seems to bear out the contention of the Government at all. Mr. Dewell was put on the stand in one of these customs cases, similar to the De Lima case, and it appeared there had been a protest. He stated on the stand that when he discovered that his partners had protested, he was very much annoyed because he was a good American citizen and he wanted to do what he could to support the Government, and he was anxious to withdraw any protest he had made. The underlying reason for bringing the case seems to have been to gratify the fancy of his son, who was a budding attorney. Mr. Dewell said as a good citizen, a patriotic business man, he was disinclined to take any course which might in any quarter be construed as evincing a disposition to tamper or embarass the Government in its fiscal relations. Consequently, he refused absolutely to protest, and at a later date was very much disturbed when he learned that during his absence his partner had filed a written protest upon the entry of a

small cargo. I have searched the books in vain to find a record of so good a patriot in any of these cases, and I think the case is so unusual that it should hardly serve as a precedent, except to show that Mr. Dewell chose to pay, and it is hardly to be assumed that Mr. Heinszen, a German citizen, could possibly have the same motives. He has never expressed them, and there is an absolute difference in the surrounding circumstances, that of Mr. Dewell being a plain case of the collector accepting payment under these circumstances, a statement of Mr. Dewell of his refusal to protest, but that of Mr. Heinszen being one where he was persuaded by the picturesque concomitants of the military guard. I beg the pardon of the court for having said so much upon what seems to me not only an adjudicated but also an elementary point. I presume most elementary points are adjudicated, but this point possesses both of these desirable attributes, and if your honors please, I shall say no more about it. I think I have made myself quite plain, and if I have been so unfortunate as to express myself maladroitly, or with ambiguity, I would be very much pleased to have any inquiries made on the subject that may suggest themselves to your honors. I leave, therefore, that point, to hurry through, for I feel that after having argued the case twice it is due to the court that I should be very brief.

We come now to the question of ratification, already twice argued. I take it that some things in this case are quite settled, and that one of the things settled is that the Constitution controls in these Territories when any particular provision is applicable. That is to say, that it is necessary to determine in each particular case what clause is applicable. My friends intimate very clearly right through that in the Philippine Islands we can take property without due process of law; in other words, that having gone there to civilize those supposedly benighted beings, we can begin by ignoring fundamental rights and teach them the value of confiscatory legislation. I do not propose to argue

that, but I would like to challenge the Attorney-General to know as to whether his view is that the fifth amendment applies, or whether it does not apply to the Philippine Islands, and until he says that he believes it does not apply, I do not propose to argue the proposition. The court, in the Dorr case, stated that which one of these amendments should apply must always be decided when the case arose. Justice BROWN, in speaking for the court in the Mankichi case, and also in the De Lima case, has mentioned this very right as among those rights which are fundamental in their nature, and go with the Government everywhere. Therefore, I will assume, that we are not any more at liberty to confiscate in the archipelago than we are in the States and incorporated Territories of the United States. Am I right? I think I am. I will assume, if your honors please, that being so, the sole question is whether this second act of ratification is or is not confiscatory. My friends have said something about construction. I think it might be possible, if not easy, for trained and subtle legal minds, understanding thoroughly the niceties of the English language, to explain away this statute. I trust no such attempt will be made. I think it could be done. I shall make none. I think that the statute must either stand as constitutional or fall as unconstitutional, and I say further that the question of its constitutionality to my mind, and the Court of Claims took that view and took it promptly and unanimously and forcibly, has been settled by this Court. One of the honorable Justices in the De Lima case said that the decisions should not glimmer like exhalations of a marsh, only to mislead. I do not take it that the two past decisions have anything in their nature of the will-o-the-wisp.

We argued these questions fully, and Mr. Justice HOLMES in writing for the court in the first case, in 197 U. S., in referring evidently to the point of the power of Congress, referred to it in these brief and

eloquent words: "See, further, De Lima vs. Bidwell, page 199. I happen to be very familiar with what was said on page 199, and the court is even more so, and I will not turn to it just now. What was said on page 199 was that Congress did not have the power to do any such thing as it here attempts, and if your honors please, there was a ratification as clear and unequivocal as any ratification could be, because this money that had been taken by the officers illegally, improperly and tortiously was appropriated by Congress to a specific purpose. The court cannot assume that Congress believed it to be stolen funds, and thinking them stolen funds so appropriated them to its own use.

Can any ratification of the acts of persons who collected and segregated funds be clearer than that ratification, and Mr. Justice BROWN, speaking for the court, said that that was unconstitutional. In order to make his language quite plain, he cited a number of cases, half a dozen. We have spoken of them in this court before; we will not repeat them; but those cases involve questions of confiscatory legislation, of turning over the property of A to B by legislative fiat; and if any ambiguity could remain—and I do not think there is any in the language of the learned Justice—the cases which he cites make it quite clear what the point was that he had in his mind.

Yet, it was said in Congress, following the cue coming perhaps from other departments of the Government, that that was a mere dictum of Mr. Justice BROWN. I take it that the dictum was good enough to be decisive of the case, because if the ratification was effective in that case, it was fatal to De Lima's recovery, and the ratification was in terms as I have said, about as clear as a ratification could be. It cannot be supported as a dictum. It was a decision. But if it was a dictum, it was a dictum pregnant with force and potency, because the unanimous court thought it good enough in the 197 U. S. to refer to the mere page upon

which this dictum was expressed as a disposition of the Warner Barnes case then at bar.

If your honors please, assuming, however, that that question is still left open, after two full arguments at this bar, we claim that the act was confiscatory. Certain Federal cases have been cited. It is not necessary for me to analyze or read them. I will assume that this court knows them better than I—Calder vs. Bull, Satterlee vs. Matthewson, and all the rest of them—every one of them passed before the Fourteenth Amendment. In every one of those cases it was said that on the action of the States there were only two inhibitions, namely the impairment of the obligation of a contract and the passage of *ex post facto* laws, and if the action of the States did not fall within either of those categories, it was legal and the legislature had all power over property, however much it might be a divestiture of right, and however deplorable it might be. Mr. Justice PATTERSON, himself one of the framers, of the Constitution, in Calder vs. Bull, said that he wanted to pass such an Act as was embodied in the Fourteenth amendment—"I had an ardent desire to extend the provision in the constitution (as to *ex post facto* legislation) to retrospective laws in general. There is not a policy nor safety in such laws; and therefore I have always had a strong aversion against them," &c.

But the wisdom of later generations came, and we have the fourteenth amendment, and various members of this court, writing for the whole court, in the Tonawanda case, and the case of the Barber Asphalt Company, and in the case of Norwood vs. Baker, have all stated that prior to the fourteenth amendment such things might have been done. We have passed away from that time, and have come I trust to a better age where, as the court has said, the states are subjected to the same inhibition as the federal government, namely, that they cannot take property without due process of law; and due process of law under the fourteenth amendment and in the fifth amendment mean precisely

the same thing. Therefore, the Federal cases cited are irrelevant and inapplicable, and are only of antiquarian interest.

MR. JUSTICE HOLMES : I do not think you noticed that in the second opinion the language was, "even if Congress could deprive plaintiffs of their vested rights in process of being asserted, Hamilton vs. Dillin," etc.—in other words that that case was cited as having possible equal applicability with the case of De Lima.

MR. COUDERT : I am very glad that your honor has called my attention to that case. I remember perfectly the situation there referred to. That was the case the Government had relied upon in discussing this question of power, and I take it that the language in the Warner Barnes case referred to the contention of the Government. I know that the decision went off largely on the question of construction.

MR. JUSTICE HOLMES : It went off wholly, I should say, on the question of construction.

MR. COUDERT : Well, I think that where two questions are involved in a case, you can hardly say that the reason by which they are reached are both dicta. Otherwise, you would have no decision. I take it that the reference to the De Lima case—that case I take it is the law of the land ; was made as a disposition of the question of power. Then the question of ratification was also argued. I take it that the citing of the De Lima case upon this point, shows it was deemed by this court to be the law of the land, that there must be an end to this class of litigation at some time. I take it that the De Lima case is the law of the land, and is spoken of in that particular phase of it, with approval in the first opinion ; in the second opinion the court did not deem it necessary to dispose precisely of the question of power, because as your honor has said, it turned finally upon the question of construction.

My friend has cited bond cases, and I think Mr. Justice HARLAN mentioned certain bond cases. I take it they involve a different principle. I do not take it that the Yankton case can have any relevancy here. I

take it that if a municipal corporation, which is a mere sub-division of the State, should disclaim its obligation, should retain money received from invalid bonds and then the State should attempt to ratify those bonds, the State has a perfect right to ratify them. It simply means that they will appropriate money to pay a just obligation. They may, if they like, appropriate money, I presume, for any legitimate purpose not forbidden by the Constitution, and if they propose to appropriate money to pay the unfortunates who had parted with their money on the strength of apparently good bonds, upon an apparently valid bond issue, that is a perfectly proper thing for the Legislature to do. The municipal corporation has no vested rights not to pay for what it has received. It is a mere sub-division of the State. The State has full jurisdiction over it, and if it chooses to force it to pay for such invalid bonds, it is only fulfilling a moral obligation. It seems to me that those cases are wholly inapplicable. My mind is not subtle enough to perceive the relevancy of those cases to the case at bar, or that there is in them any justification for a deprivation of property by the strong hand. On the other hand, the only deprivation of property is in the case of the unfortunate bond holder, who has paid his money, and would have lost it if the legislature had not given it back to him. Surely the bond holder would have a perfect right to some kind of action, in the nature of restitution, to be made good for the money he parted with.

MR. JUSTICE HARLAN. The case I had in mind was the case of the tax payer.

MR. COUDERT. Curative statutes?

MR. JUSTICE HARLAN. Yes, where the tax payer went into court and said "These bonds have got to be paid by taxation, which will take my property, and I want to enjoin that."

MR. COUDERT. Precisely, if your honor please.

MR. JUSTICE HARLAN. But the legislative department

in the meantime has ratified what the people have inadequately and without authority done.

MR. COUDERT. That was quite good as a present tax. I take it they could do that tomorrow. The obligation of the tax payer would be from the time the legislature passed the act. Say to the tax payer, you receive the benefit, we have the right to tax you for any legitimate object, and then they pass an act which is in effect an original tax. Thus there would be no ground for equitable relief.

As to the case of Hamilton vs. Dillin, your honor will remember that that involved the question of the war power of the President, acting under a statute, to license certain persons to engage in the cotton trade. The argument was that it was unconstitutional, although the statute was very plain, that the President had a right to collect these bounties under such rules and regulations as the Secretary of the Treasury chose to make. It was stated in the body of the case—only three cases were cited, the Leitenderfer v. Webb case and two others along the same line of thought—that such action was fully within the war power of the Executive without a statute, and that the statute gave it to him anyhow. Then in addition it was said that the Act of Congress ratifying particular schedules that the Secretary of the Treasury had made was a proper ratification. It might well be said it was a mere ratification of a particular schedule the treasurer had made, because the President had the power to impose a license tax in any event. Your honors will notice that no stress was laid on the point of ratification, and the question of confiscation was not argued, although Mr. Evarts and some other gentleman of almost equal ability were in that case. It is hardly possible that a question of that importance would have escaped their vigilance. It was not necessary to the decision of the case. Your honors will notice further that that was clearly a case of voluntary payment, because this claimant went and actually bought a license. There were no persuasive

bayonets in that case. There was no force threatened. The man went and bought a license to engage in a particular trade, and if there is anything better than that to indicate the free choice of the individual, I do not know of it. He purchased the license and paid for it and applied to be allowed to engage in this business. He certainly could not say that he was acting under any duress. He was not forced to discontinue any business that he had, and under those circumstances I think what Mr. Justice BROWN said in De Lima case is pertinent—that as far as being voluntary the payments might be ratified as showing the intention of Congress to retain the money. It seems to me there is nothing in that case which militates against the view of this court in the De Lima case. No question of confiscation arose; none was necessary.

If your honors please, there are some State cases which my friend has laid considerable stress upon. A great many of them were so unfortunate as to arise before the fourteenth amendment, and can have little or no relevancy here. I stand on the proposition, as regards those State cases, that was laid down by Mr. Justice PECKHAM when he was in the Court of Appeals in the State of New York, and I do not suppose that anything that has since transpired in this Court has caused him to change his views as expressed in that very careful opinion. He says there:

"What difference does it make to say that the legislature is acting only in the way of validating proceedings to collect a tax which in justice the owner of the land ought to pay? The answer is that the proceedings have been so fatally defective that no title has passed, and the owner has his title to his property the same as if no tax proceedings had been taken."

Now, if your honors please, the point we made in the other argument, and the point we make here is that the legislature has no right to transfer the property of B to A, whether it be under the guise, as Mr. Justice PECKHAM says, of a tax law, or of any other kind of a law. If there be a mere informality, if an assessment

be necessary, it is perfectly proper for the legislature to do something. My friend has cited the Florida case in which certain property had *escaped* taxation. Here no property had escaped taxation. We were traders in the ordinary course of our business, trading where trade was free under our Constitution and it is now attempted to impose a tax on us forsooth because five or six years ago we brought in certain goods. In the Florida case all the land in the State was taxed, railroad lands among others, and by some subterfuge or jugglery, the taxing officers failed to tax the lands of this particular railroad. The legislature simply created a new network or machinery by which those properties which were subject to levy were taxed. It passes my understanding how that is a precedent for a case of this kind.

MR. JUSTICE WHITE: In the case to which Mr. Justice HOLMES has called attention, the Washington or Oregon tax case, my understanding is that under the law at the time the improvement was made, the particular property which was afterwards brought in was not subject to taxation.

MR. COUDERT: Very likely, but the property was there, and when the tax was laid it was good as an original tax—precisely as Mr. Justice PECKHAM has said in the Cromwell case, and as was also said in the Lennon case. In a case of that kind—it is not new doctrine, it is old—the ratification is good as a new tax. The property is there and the property may be subjected to taxation. If the ratification act comes in, the property owner then can no longer say, I am not subject to taxation, because the legislature has the right to tax that specific existing property.

Mr. Justice BREWER has put his finger on it when he says that the question is whether they can go back ten years and say, we will tax you on an importation which was made freely at that time. That is the question and the only question. It is very much as if some gentleman was kind enough to invite me to dinner and than a year afterward to send me a bill and state that

as I received a very good dinner I ought to pay for it. I conceive I would be under no legal obligation to pay for it, although I had received the dinner. It is true we shipped the articles under a regime of practical free trade. Can you go back now and impose a tax? I say no, that is inadmissible. In the Pell case they said, is it possible to contend that the legislature could have taxed watches that were purchased before 1855, or watches indiscriminately, and the court said clearly that would be confiscatory. I ask no better example. It is the same principle, except that this case is much stronger, because it does not pretend to be a property tax, it is a tax on the privilege which a man has a right to exercise or not, and if he had known that he was going to be taxed, he might not have exercised that privilege. You might just as well tax a man, it seems to me, because he had practiced as an attorney twenty-five years ago, although he had been an apothecary ever since. It is an extraordinary proposition, and there is absolutely no authority for it. The Court of Claims cut the gordian knot by saying these questions as to curative statutes can have no force where a tax was fundamentally laid without power. It was not a tax at all. The exaction was called a military contribution. Where an exaction of this kind is without fundamental jurisdiction, it cannot be made good by retroactive legislation, and that is what the State cases claims for it. It is not a question of commissioners acting within a general authority exceeding somewhat the limit of the amount; but here the collectors had no authority whatever. If they had had any and made a mere blunder in the exercise of their jurisdiction over the subject matter, we would have had to proceed under the customs regulations, and we would have had no standing in the Court of Claims. The fact that we had a standing in the Court of Claims shows that their action was fundamentally extra judicial.

If your honors please, we have been met by two or

three extra-legal arguments in the Warner Barnes case. We were told that we were traitors to the flag, and there was an endeavor to prove in the Court below, and the judge advocate general was called to show that among some of Aguinaldo's papers was a draft of Warner Barnes, and that Warner Barnes had therefore been encouraging insurgents. The answer we made was that the Governor General, if that were so, should promptly have decapitated Warner Barnes and the whole Company, and we presume that that would be the proper remedy. But we could hardly see how such an argument could be used in court. No bill of attainder had been passed, and we presume if they had been wrongfully deprived of their property their heirs would have been entitled to it. As Warner Barnes have been paid, and as they are the only people who have been paid, the question of course is not raised again. As that argument cannot be made here we are met with the laws of trade, and we are told that we are outlaws because, forsooth, according to laws of trade—I used to think there were only Democratic laws of trade, but I believe they have been adopted now by the dominant party—the consumer pays the tax, and therefore under this newly vitalized and now sanctified rule, we must have recouped ourselves. The answer is that in every possible customs case that we have known of that same argument might as well have been made, and it would be a very convenient thing for the Government to divest itself of all liabilities for improper exactions and levies of any kind. I take it when the assessments in New York real estate were raised nearly double, that any of us who were fortunate enough to possess any property tried to raise our rents accordingly, but I have never known of any landlord who suing for an illegal tax being met with the answer, "Why, you raised your rent and the tenant paid it." In addition to that, as the gentlemen have gone out of the record, I may say for their benefit that most of these Philippine com-

panies are pretty nearly bankrupt and many of these goods they have never been able to sell at all.

The situation here is a little peculiar. It would be almost funny if it did not rise almost to the dignity of a diplomatic incident. We were invited by the Government to go into the Court of Claims. Under the treaty with Great Britain and with Germany, British and German subjects are entitled to sue in the Court of Claims provided reciprocal rights are accorded to our citizens on the other side of the water. A British citizen sues. Mr. Heinszen and numerous other claimants sue, and they are met in this court by the Attorney General who informs this honorable court that these claimants must stand or fall on the case of Warner Barnes. It was not necessary therefore for us to come here with 250 or 300 cases. We supposed that one was enough, and Mr. Heinszen, the German subject, was satisfied to abide by the result as a test case. Twenty-four hours afterwards the Britisher finds himself paid, and the German who is given similar rights finds that while his brother who has brought the suit has been paid, he had been thrown out of court, and he is told that he has no redress. Such a result is very extraordinary, and why the Government should discriminate against a subject of the Emperor William and in favor of a subject of King Edward I do not know. I leave that to the respective ambassadors.

If your honors please, I thank you for having borne with me so long in an argument that must surely seem repetitious. We claim that the question of protest is a merely trumped up issue that was here before, that this particular statute is what the other was or attempted to be, although expressed inartistically, confiscatory, and therefore unconstitutional. I have stated the extraordinary situation of the test case having been disposed of, and these other cases attempted to be relegated to the limbo of forgotten and just claims; and I ask the Attorney General to say whether under all these circumstances he as

a fair minded man thinks that accords with a square deal; and if it is not a square deal, in what way and under what view and on what theory it is constitutional, and not the taking of property without due process. I thank the Court for their kind attention.

Argument of Mr. Henry M. Ward.

If your Honors please, I shall take up immediately this question of the power of Congress to ratify, and say only a few words about the question of protest or voluntary payment. On that question I merely wish to correct one statement which I think Mr. Van Orsdel made, that it was the military collectors who took possession of these goods on the vessels. The record shows, and it is found as a fact by the Court, that the military collectors of customs, as soon as these vessels arrived, placed them *under a military guard*, in conformity with the regulations. The Court found that the regulations required that every vessel on its arrival should be placed *under a military guard, that no delivery of imported merchandise should be made from the custody of that military guard until the payment of the duties.* Of course, as we have said, this was all before the Court in the Warner Barnes case, and the findings of fact in this case are the same in that respect as in that case, except that the facts in this case are stronger in our favor on the question of duress.

Now, as to the power of Congress to ratify the collection of these duties, and the question of the violation of the Fifth Amendment. Let us consider for a moment what this Court did decide in the *Warner Barnes* case as reported in 197 U. S. 419, and 202 U. S. 484, and in the first Dooley case 182 U. S. 222. It decided that these moneys were exacted from our clients for the period of nearly three years as a military contribution, under the guise of customs duties, but absolutely without warrant of law; that these moneys were taken by the agent of the United States

and turned over to the United States, and are in its possession, and that they are our moneys and that we had the right to sue the United States for their recovery in an action for money had and received. And, as was suggested by the Court in the De Lima case, these were moneys legally and equitably belonging to the claimants. The question then is, *can the United States by an act passed in 1906 divest the claimants of their title to these moneys, and transfer that title to the United States?* Does this differ in any way from a case where A has the money of B, and an act is passed by the legislature transferring the title to that money from B to A? Is not that the precise situation here and is not the present act just the act supposed and equally in violation of the Constitution? Or take the case of the *United States vs. Lee*, cited in our brief, 106 U. S., where the agents of the United States took possession of certain real estate. The Court held that the United States could not divest the owner of the real estate of his title and that Congress could not transfer the title from the owner. Now, it is said—and logically it is the only position which the government can take in this case—it was stated here by Mr. Van Orsdel in his argument and it is stated in the Attorney-General's brief, p. 63, that our money can be taken from us because in the year 1906 Congress had the power to impose a tax upon our clients for having brought merchandise from New York to Manila during the years 1899, 1900 and 1901; in other words, that Congress can impose a tax retroactively. That is the only position which the government can take in this case, logically, for the fact that the money is in the possession of the United States cannot make any difference as to the power of Congress to tax us, and Congress cannot tax us and deprive us of this money because the money is in the possession of the United States any more than it could if the money were in our possession. The very foundation of our claim is that *this money is ours.* The United States has our money, and we have the right to sue

for its recovery. What possible difference can it make as to the power of Congress, whether the United States has the money in its possession or whether the money is in our possession ? ✕

The position of the government then is, that Congress at this time can impose a tax upon a transaction that occurred six years ago. Let us see for a moment, on what this tax is imposed.

MR. JUSTICE WHITE : I do not know that the case is applicable, but there is a case I have in mind. It would not be claimed that Congress could impose an internal revenue tax on tobacco sold ten years ago. That is clear, I take it. There is a case where under the existing law there is only a tax on the manufacture of tobacco, and the tobacco had been manufactured and all the processes upon which the tax was laid were completed. Yet Congress passed a law increasing the tax on manufactured tobacco.

MR. WARD : Exactly.

MR. JUSTICE WHITE : And this Court held in view of the fact that that tobacco was in warehouse, and that it could reach it in that way, that that tax was valid. Now why, if there was an existing tax and your money was there, taken as a result of that tax, isn't it a different thing from imposing a tax when you cannot get at the property, or get at the result in any way, because it is gone before the law is passed?

MR. WARD : Because in this case *there never was any tax at all.* This Court has decided in the first decision in the Lincoln case (197 U. S., 419), and affirmed it in the second decision (202 U. S., 484), that there was never any tax here at all. It is simply a case where the United States has in its possession three and one-half million dollars belonging to these claimants, and that is the law of this case.

I am familiar with that case which your Honor has cited. It brings out a distinction that I had in mind.

MR. JUSTICE HOLMES : Can you give me the name of the case ?

MR. WARD : It is Patton vs. Brady (184 U. S., 608,

✕ See also cases cited 202 U.S. 486-487

623). The tobacco had been taxed once under the internal revenue tax. Upon what was that tax on tobacco levied? It was an excise, a consumption tax. That is, it was a tax upon a luxury that is used, just as is the tax on spirits, or wine, or any other article of luxury or consumption. It is not a direct tax on the tobacco. It is an excise tax. Here is the tobacco in the warehouse, and it has never been used. The legislature of course can continue to impose a tax upon the use of it until it has been used, and it has passed into the mass of general property in the country.

MR. JUSTICE WHITE: Do you insist that the tax is upon its use? Suppose it is burned, or never is used, can the tax be recovered? Suppose it never is used, and it is there for one hundred years. It is a tax on the manufacture, not on the use.

MR. WARD: I had always supposed that it was a tax on the use.

MR. JUSTICE WHITE: Suppose it has been put in the warehouse and cannot be used? Can you recover the tax? You ought to, if it is a tax on the use.

MR. WARD: It undoubtedly should be recoverable in such a case. If that excise tax had been levied plainly and unmistakably on the manufacture of tobacco that would be a different question, but I do not think it was. I think it was an excise tax upon the consumption or use of the tobacco, just like an excise tax on spirits, or other commodities, which are articles of luxury.

MR. JUSTICE WHITE: The argument in the Patton case was that if it was a tax on manufacture, the manufacture having been completed, then to attempt to retax it would be taxing it as property and imposing a direct—and putting a further tax upon it—was to put a direct tax upon it, and therefore the tax was void. That was the argument.

MR. WARD: I am very sure that the Court did not decide the case upon the proposition that the tax was levied retroactively upon something that had been done in the past.

MR. JUSTICE HOLMES: I suppose it would be admitted that a tax could be levied retroactively for something done in the past, if you could get at the property. For instance, a tax for the construction of a street built last year, at the time there was no tax then outstanding. Suppose that a year after an import, it happens that some tea or something else is in the hands of the government and can be got at, what objection is there to another application of the same principle.

MR. WARD: To my mind it is exactly this. In the one case there is a direct tax on property. In this case which we were discussing, in the Oregon case, the tax was levied by a municipal body on real property. It was an assessment upon property for the laying out of a highway. The property was always there, the highway was there and the property had gotten the benefit of it and the legislature at the time it ratified it, if it did ratify it in that case, could have imposed the tax directly on the property. It was not a tax upon the use of the property; it was not a tax upon importation nor upon sale, nor upon anything that had been done in the past or completed; but it was a tax upon property right there. The tax in this case is levied upon the act of importing—I will say importing, though it is not technically correct,—but we will say upon importing goods from New York into Manila. The tax is not laid on the goods themselves but on the act of importing them, and that act of importing was completed four or five years before the law was passed.

MR. JUSTICE BREWER: Does that in any way resemble the succession tax, a charge upon the transfer of property by death?

MR. WARD: I think it resembles it very closely, indeed, and there the state Court of Appeals in New York held that where a will, which took effect before the succession tax law was passed, created a vested remainder, and that remainder vested in enjoyment after the passage of the act, and was expressly taxed in the language of the act, in such a case the tax was imposed

upon a transfer which took place before the act was passed, and the legislature could not tax it because it would be taxation without due process of law. This was held squarely in the Matter of Pell. It was then held subsequently that the same rule applies to a contingent as to a vested remainder, and in the cases where the power of the legislature to tax the transfers of remainders has been sustained, have all been cases where a power of appointment has been exercised and the transfer has taken place by virtue of the exercise of the power subsequently to the passage of the act.

MR. JUSTICE BREWER: The constitutional requirement is that a tax on property should be assessed and collected year by year, and it could be done for as many years as the property was there. But suppose personal property is here today, subject to a tax, and tomorrow is removed to a foreign country. Does the government have the power to put the tax on that property after it has passed outside of the jurisdiction?

MR. WARD: I would have very serious doubt of whether it could (see *Kentucky vs. Union Transit Co.*).

MR. JUSTICE BREWER: Even when the transfer by succession is completed, or the act of importation—you would put that upon the same ground, that the thing was finished?

MR. WARD: Exactly; the thing has been done. If due process requires that before a tax can be levied and assessed directly upon property the tax-payers shall have the opportunity for a hearing, how much more must it require that a tax upon an act, an act of importation, or any other act, must be levied *before the act is performed*, because otherwise we would have no due process of law. We have no opportunity of declining to do the act on the condition imposed. Where the tax is laid before the act is done, the tax-payer has opportunity to escape it. But in a case such as this he has no chance at all. If Congress can do this now, why can it not, as your Honors suggest, impose a tax on articles now on the free list, articles which

have been imported under the free list for the past ten years?

MR. JUSTICE DAY: Do you claim that your position is analogous to the Pell case where the estate was fully vested?

MR. WARD. I think it is exactly analogous to that. In the Pell case, the testator made a will in 1870 by which he created a vested remainder. The life estate terminated after the act imposing taxes on remainders took effect, and the act of the legislature—

MR. JUSTICE DAY: Assessed a tax upon entering into possession?

MR. WARD. Yes, and the court of appeals said there the transfer took place at the time the testator died, and not at the time possession was entered into, and therefore could not be taxed.

MR. JUSTICE BREWER: Take the license tax for selling liquor. The tax is fixed at a certain rate for a year. The tax is paid, and the year is passed. Can the government turn around afterward and say, we will now charge you as a license for that which is already completed double that which you have already paid?

MR. WARD: I think not. I think if the tax is on the act of selling, you cannot tax a sale which is in the past. If it is on the liquor, which remains in a man's possession, it is a different question.

Again this act might be called, as we have said in our brief, the imposition of a penalty for doing an act innocent when done. Here our clients do an act which at the time they have a right to do, without paying any tax or penalty—that is, to bring goods from New York to Manila. In 1906 Congress steps in and says all this money which is taken from you is confiscated under the guise of ratifying a tax. It simply amounts to a penalty, to a punishment. The point which I am making has been illustrated by this Court in two or three cases cited in our brief. In the Burgess case, 97 U. S., the Court held that an act of Congress should not be construed to take effect at a certain time because if it did so, it would impose a tax retroactively

upon a number of things. I think in that case it was a tax on tobacco which had been removed from the warehouse before the law was passed, on the very day the law was passed, but before it had received the signature of the President. This Court said that this law cannot have taken effect at the very first instant of that day, it must be deemed to take effect from the moment it was signed, because otherwise it would impose a tax retroactively.

MR. JUSTICE BREWER: In this case would there be any lack of power on the part of the government to tax at the time of the importation, and if there was no lack of power, does it not make the effort a simple form, an informality in the proceeding—

MR. WARD: Not at all, your Honor. It is true that this Court has held in the second Dooley case (183 U. S., 151), that Congress has the power to impose a duty on goods shipped from New York into Porto Rico and by analogy into the Philippines, to impose such a tax prospectively; but at the time this tax was collected from us there was no act of Congress in force, and this Court held expressly in the first Dooley case that the President did not have the power to collect these duties, his officer was a mere trespasser, and he took our money. There was no question of irregularity. It is a question of the absolute lack of power and jurisdiction.

MR. JUSTICE WHITE: Not the lack of jurisdiction of the United States?

MR. WARD: The lack of jurisdiction on the part of the executive officer.

MR. JUSTICE WHITE: But then the executive officer acting under color of authority, but without legal authority, did the act. Now Congress comes in, and it is admitted that Congress would have had full power to authorize him to do that act. He did the act without authority. Congress comes along and says, I approve the act of the officer, and give it my sanction retroactively. You say that must be treated just as if no act had ever been done?

MR. WARD: Just as if no money had ever been collected. That is the position taken by the government in this case, and I think logically they are driven into it, and I do not see any escape from that position. Because the money remained ours all of the time. If it was not ours we had no right to bring the action, and no right to bring the action in the Warner Barnes case or the Dooley case. This was our money collected by men who had no right whatsoever to take it away from us, mere trespassers.

Now a word with regard to the decision in the case of *Hamilton vs. Dillin* (21 Wall, 73). This was the case discussed rather briefly by my associate, but I would like to go into it at some length, because, as Mr. Justice HOLMES said, this Court said in the second decision of the Lincoln case in the 202, U. S., that even if Congress has the power, "see Hamilton vs. Dillin, etc." Our contention is that Hamilton vs. Dillin is absolutely no authority whatsoever for holding that Congress can ratify an illegal collection of duties or taxes retroactively. In Hamilton vs. Dillin by an act of Congress of 1861 the President was authorized to regulate commercial intercourse with the insurgent states, and it was provided that such commercial intercourse should be had in pursuance of rules and regulations to be prescribed by the Secretary of the Treasury. Now, this act of 1861 did not prescribe any rules and regulations whatsoever, but left them to be prescribed by the executive. The Secretary of the Treasury established these rules and regulations which provided among other things that on purchases of cotton and transporting the same to a loyal state, four cents a pound should be paid. Hamilton desired to engage in this traffic, it was unauthorized, illicit traffic, which he had no right to engage in except upon permission; he applied for a license, paid the license fee of four cents a pound—bought cotton in the insurrectionary states and then sued the collector, Dillin, to recover the license fee. There had been a regular machinery established. He sued the man to whom

he had paid the license fee for its recovery. In the meantime until 1864, the money was simply held, so far as appears from the case, but without being paid into the Treasury of the United States—apparently held by the Secretary of the Treasury or the Secretary of War, but not paid into the Treasury of the United States. In 1864 Congress passed an act providing that all moneys collected from these license fees should be paid into the Treasury of the United States. This Court held in that suit in the first place that the President had the power, without any act of Congress authorizing him, to impose this license upon trade with the insurrectionary states, that it was a necessary incident to the war power ; and it held secondly, that the act of Congress expressly authorized him to do this, and that act of Congress was passed, not under the power to lay taxes, duties, imposts and excises, but under the war power of the nation. Then it says at the conclusion of the case that the act of July 2, 1864 recognized and confirmed the regulations, etc.

But the distinguished counsel who argued that case, among whom were Mr. William M. Evarts and Mr. Lincoln, did not make any point as to the power of Congress to ratify, and this Court did not cite a case upon that proposition. It seems to me therefore that what this Court meant was that it was the establishing of a license fee at the rate of four cents a pound on cotton purchased in licensed trade with the public enemy which was authorized and approved by Congress, as there might have been some question as to whether the secretary had acted in conformity with the act of authorization. Certainly, *Hamilton vs. Dillin* is not an authority directly in point upon the power of Congress to ratify the exaction of moneys by the Executive without warrant of law.

Mr. Van Orsdel in his argument cited another case, *Stockdale vs. Insurance Companies* (20 Wall., 323). We have referred to it briefly in our brief, but while we are discussing this point, I would like to refer to it

and bring the point I have in mind directly before the Court. In *Stockdale vs.* the *Insurance Companies*, a tax had been levied by the collector of internal revenue upon these companies under the income tax law of 1864. That law by section 116 imposed a tax on individual incomes, and by sections 120, 121 and 122 it imposed a tax upon dividends and interest paid by certain corporations. It was provided that when the individual made his return on his income, he was not required to make any return on the tax paid on the dividends or interest which he had received from corporations which had paid the tax. Now, by an Act of 1867, it was provided that section 119 of the Act of 1864 should be amended so that the income tax should be in force until December 31, 1869, and no longer. On July 14, 1870, an act was passed by which it was provided that sections 120, 121 and 122 of the Act of 1864, by which this tax on the earnings of corporations was imposed, should be construed to be in force until the first day of August, 1870; so that the question which was before the Court, as clearly appears from some later cases in which this case was cited, was whether the Act of 1867 which limited the duration of the income tax to the 31st of December, 1869, applied to the personal income tax and to the tax on dividends and earnings of corporations as well, or whether it applied only to personal incomes. Now, in *Stockdale vs. Insurance Companies* it was held that it applied only to personal incomes, and that but for the Act of 1867 the tax on the earnings of corporations would have been in force indefinitely; that it was a limitation on the period for which that tax should be in force, not a re-enactment and revival of a tax which had expired in 1869. The dividends, etc., on which the taxes were imposed in Stockdale vs. Insurance Companies were declared and paid in 1870 before this act took effect, and it was claimed that the act was retroactive. The real ground on which that case was decided must have been that Section 119 as amended in 1867 did not ap-

ply to the tax on corporation earnings, because in a subsequent case which I have not cited in my brief, but one to which I would like to call the attention of the Court, the case of *Erskine vs. Milwaukee and St. Paul Railway Company*, 94 U. S., 619,—(and I would like to cite it in connection with our argument at page 37 of the brief, in which we refer to the Stockdale case.) The Stockdale case has been cited here by the government as an authority for the proposition that Congress can impose a tax retroactively, because it is claimed that the act of 1864 expired in 1869, and it had been revived in July, 1870, so as to impose a tax upon dividends declared and paid between December 31, 1869 and July 14, 1870. But in this *Erskine* case the question that was before the court was whether *a penalty* could be collected from a railway company for failure to make the return which was required by the act of 1864 on its dividends, and interest, on which the tax was imposed by the 120th, 121st and 122d sections of that act. The Court held in a very brief opinion of only about half a page, in which it cited *Barnes vs. Railroad Companies* and *Stockdale vs. Insurance Companies*, that the penalty of one thousand dollars could be imposed and collected from the railroad company. Now, obviously, if that law imposing a penalty for a failure to make a return had expired with the year 1869, Congress could not on the 14th of July, 1870, re-impose a penalty and collect it as was done in that case in 1871, because such imposition of a penalty would clearly have been an *ex post facto law ;* and as Stockdale against the insurance company is cited as the basis of the *Erskine* decision, the conclusion is irresistible that Stockdale vs. the Insurance Companies is an authority upon the construction of the Act of 1870, and of the income tax law of 1864, and not an authority for holding that a tax can be imposed retroactively.

Now a word with regard to the case of *De Lima vs Bidwell*, and what was decided in that case upon the

power of Congress to ratify. That question went to the very root of the plaintiff's right to recover judgment against Bidwell. If Congress had the power to ratify the collection of those duties on the imports from Porto Rico, then the plaintiff clearly was not entitled to judgment. The Act of March 24, 1900, was, it seems to me, the strongest ratification of the collection of those duties—the appropriation of the moneys collected. Complete ratification by actual appropriation was the natural intent and meaning of the act. This Court gave it the construction in that case that it did not apply to the De Lima case, and to other cases where duties had been paid under protest and suit brought for their recovery, because it held that Congress had not the power constitutionally to impose such a tax. The question of the power lay at the very root of the right to maintain the action, and the Court decided in a perfectly clear and unequivocal opinion that after suit had been brought against the collector for recovery of such a tax Congress could not impose it, and that was one of the distinct grounds upon which that decision was based. In fact, it was the most important ground, because if the tax had been ratified, then the entire discussion of whether Porto Rico was a foreign country and all that was entirely unnecessary to the case.

We have made it a point in our brief, and it seems to me that is entirely in line with the general principles on which our government is framed, and it is illustrated by Chief Justice MARSHALL in Fletcher vs. Peck, that where a state or the United States is liable upon a contract, whether the contract is expressed or implied—and in this case it is an implied contract on which it is liable to the claimants—and the case is brought into court and the government lays its court open to the claimants, creates a court for the purpose of adjudicating these claims, Congress cannot say that they now repudiate the claim, they cannot pass a law absolving it from the obligation of that contract. The illustration which Chief Justice MAR-

SHALL made your Honors will find at page 62 of our brief.

Just a word more with regard to the situation in the Philippines and how these taxes were imposed and all that has been said in regard to the expenditure of these taxes for the maintenance of government and all that. This law—Your Honors will recall we made a point of it in the case of Warner Barnes,—this Court decided the Insular Cases in May, 1901. Immediately after that decision was handed down, Mr. Secretary Root cabled Mr. Taft that the Court had not yet decided the status of the Philippine Islands, and, therefore, to continue the collection of duties on imports from the United States. Your Honors did not decide the case of the Fourteen Diamond Rings, by which the status of the Philippine Islands was determined, until December, 1901, and the collection of this tax expired November 15, 1901, so that until the law was settled by this Court it could not be told whether the government had the power to collect the taxes or not.

Every one of these cases was submitted to this Court by the Attorney-General in the Warner Barnes case. How can Heinszen and Company and all these other claimants be deprived of the rights to recover these duties, because their cases were not on the docket? The Warner Barnes case was brought up here regularly. The Attorney-General submitted a statement in this Court, of claims filed amounting to three and a half million dollars, and in that statement he specified every one of these cases, including the case before the Court, and said that these cases all depended upon your Honors' judgment in that case. They were all before the Court just exactly as much as if they had all been on the docket, and should now be regarded as if in every one of them we had entered judgment on the 8th of June, 1906.

Before closing I wish to state that I have now before me the case of Patton vs. Brady, and as so much has been made of that case as to whether the tax was laid on the manufacture or the sale of the tobacco, I

would like to read from that case to your Honors. It is in the 184th U. S., page 608, and I am reading from page 623.

(Counsel read at length to the Court.)

MR. JUSTICE WHITE. It is upon the act of sale, not the consumption.

MR. WARD. Well, the act of sale. The sale had not taken place.

MR. JUSTICE WHITE. I agree to that. It was not on the use of the tobacco.

MR. WARD. Oh, I did not mean the act of smoking it. I thank your Honors very much for your attention.

Office Supreme Court, U. S.
FILED.
APR 8 1907
JAMES H. McKENNEY,
Clerk.

FILE COPY.

IN THE

Supreme Court of the United States.

October Term, 1906.

No. 580.

THE UNITED STATES, *Appellant*,

v.

CONRAD HEINSZEN and GUSTAV BROCKMANN, trading as Partners under the Firm Name of C. HEINSZEN & CO.

BRIEF

Filed for Certain Claimants Having Interests Similar to those of Appellees.

HILARY A. HERBERT,
BENJAMIN MICOU,
Counsel.

IN THE

Supreme Court of the United States.

October Term, 1906.

THE UNITED STATES, *Appellant*,
v.
CONRAD HEINSZEN and GUSTAVE BROCKMANN, trading as Partners under the firm name of C. HEINSZEN, *Appellees.*
} No. 580.

BRIEF

of Herbert & Micou, — representing Certain Claimants having Interests Similar to those of Appellee.

Statement.

This is an action for the recovery of payments made for the admission of goods from the United States into the Philippine Islands between May 13, 1899, and November 9, 1901, to which the Government filed a demurrer and the Court of Claims January 7, 1907, rendered an opinion overruling said demurrer. Whereupon the Government answered the petition of claimant, the claim was submitted and upon an agreed statement of facts judgment was awarded for the claimant against the United States for the amount claimed, $16,827.31, whereupon the United States appealed the case to this court.

Questions Raised.

The questions raised and contended for by the Government in the court below were:

1. Is the Government a proper party defendant?
2. Do the allegations of the petition negative a voluntary payment?
3. Did the validating act of June 30, 1906, legalize the collection of the duties of which the claimant complains?

Discussing these in their order—

1. Is the Government a proper party defendant?

This question was pressed by the Assistant Attorney-General orally and by briefs, at considerable length in the court below, but the following fact, well known to this court, fully answers all the arguments of the Government, viz:

The payments for which suit was brought were exacted by the United States and the money used by them.

This material fact is in no way affected from the United States having chosen to use these moneys in meeting expenses of governing the Philippine Islands, or Congress, by Section 4 of the Act of March 8, 1902, long after the payments had been exacted, having provided:

> "That the duties and taxes collected in the Philippine Archipelago * * * shall be held as a separate fund and paid into the Treasury of the Philippine Islands, to be used and expended for the government and benefit of said islands."

In the brief of the Government before this court, just to hand, there is no discussion of the United States not being a proper party defendant, and we presume the contention is abandoned.

2. Do the allegations of the petition negative a voluntary payment?

In the number of times the question of a refund of payments collected in Porto Rico and the Philippines between the ratification of the treaty of peace and the enactment of a tariff law by Congress itself for the two islands respectively has been before this court it is hardly to be assumed that this question escaped consideration. Yet counsel for the Government press with seeming seriousness their contention that the payment in this case was voluntary. We have no doubt, though, that the court considers that the case of *Swift* v. *United States*, 111 U. S. 22, is conclusive of the question. In the brief just filed by the Government, pp. 29–31, it is contended that the *Swift* case has no application here, and it is stated, to differentiate the *Swift* case from the present one, that in that case there was an express contract; that there was a running account between the Swift Company and the Government; and that the language used by the court in the *Swift* case is general and not material to the grounds upon which the case was decided.

As to the question of there having been an express contract and a running account, we can see no bearing whatever that those facts can have upon any dissimilarity of principle between the two cases. There was certainly a contract here to pay back these duties, and a contract is a contract, equally binding whether it be express or implied. The bearing of there having been a running account, if such was the case, we are unable to see. What is stated in the opinion is as follows:

> "It must be admitted that the course of dealing and periodical settlements between the parties, *whether the accounts be regarded as running merely or stated*, shows clearly enough that the business was conducted upon the basis, that the claimant was

> to receive his commissions in stamps at their par value, and not in money, and that this was asserted by the Internal Revenue Bureau and accepted by the appellant."

In other words, what is said is merely to show the compulsion which the Swift Company was under from the Internal Revenue Bureau with whom it was dealing.

As to the language used by the court in the *Swift* case not being material to the grounds upon which the case was decided, as we read the case, it was absolutely material. The language was used in connection with the decision of the very point at issue, viz., whether the failure to make a protest at the time the taxes were exacted barred the right of action being brought to recover back taxes illegally exacted; and the court held that it did not bar such action.

If this point now being pressed so strenuously escaped the ingenuity of the many able counsel who first and last have represented the Government since the commencement of the Insular Cases, it must have been because the exigencies of desperation have not hitherto been so great as now. Of one thing we feel sure: The point, if sound, would not have escaped that attentiveness which the members of the court have, individually and collectively, given to these cases.

3. Did the validating act of June 30, 1906, legalize the collection of the duties of which the claimant complains?

Our contention is that this act did not validate the exaction or legalize the collection of these so-called duties, because

CONGRESS COULD NOT CONSTITUTIONALLY VALIDATE OR LEGALIZE THESE COLLECTIONS.

Without quoting from authorities with which the court is perfectly familiar, the *Dooley* case, 182 U. S. 235, the

Warner Barnes case, 197 U. S. 428, and the same case on the application for rehearing, 202 U. S. 484, settle that the President's authority, as Commander-in-Chief, to exact duties in the Philippine Islands upon imports from the United States, ceased with the ratification of the treaty of peace, and that right to free entry of such goods then began and continued until Congress passed a tariff law for the Philippines.

This statute makes it the law of this case that the action of the authorities in levying these payments was at the time of exaction *ipso facto* void, and without color of law; and the right of the claimant to recover for such collections immediately vested and became at once complete and perfect in every respect.

Such right of action was property of the claimant, just as much so as money in bank, or land to which he had a fee simple title, and could not be taken from him by legislative fiat.

> "This right to bring an action of law, in other words, a legal chose of action, constitutes a valuable kind of personal property."
>
> Darlington on Personal Property, 107.

This court has held that a right of action was property. *Angele* v. *Chicago, St. P. M. & O. R. Co.*, 151 U. S. 138.

At the time of the passage of the act of June 30, 1906, suit had already been brought on this chose in action. The act is as follows:

> "That the tariff duties, both import and export, imposed by the authorities of the United States or of the provisional military government thereof in the Philippine Islands prior to March 8, 1902, at all ports and places in said Islands upon goods, wares, and merchandise imported into said Islands from the United States or from foreign countries, or exported from said Islands, are hereby legalized and ratified,

and the collection of all such duties prior to March 8, 1902, is hereby legalized and ratified and confirmed as fully to all intents and purposes as if the same had by the power of Congress been specially authorized and directed."

This act, so far as it expresses intent to validate the collection of the money here sued for, is unconstitutional, because

1. It deprives claimant of his property without due process of law, and appropriates his property to public use without just compensation, in violation of the Fifth Amendment to the Constitution, and violates Section 1, Art. III, of the Constitution, which provides that the judicial power of the United States shall be vested in one Supreme Court and such inferior courts as the Congress may from time to time ordain and establish.

The decision of the Court of Claims (p. 17, Rec.), refers to two classes of cases between which exists a clear distinction, generally recognized and fundamental, viz:

(1). A class where is presented the curative force of statutes applicable to the failure to comply with the provisions of law relating to the assessment and collection of the tax, but where the tax itself is not fundamentally illegal.

In this class of cases the curative act is valid. Then,

(2). A class where is involved the right of a legislative department to cure an entire want of authority of the tax executor to act at all. In other words, by retrospection to create a tax which was not a tax before.

Where attempt is made to cure the entire want of authority the act is invariably declared invalid.

The legislation under consideration as a curative act falls clearly within the second class.

In the present case there was entire want of authority of the tax executor to act at all, both because the President had no power to impose such duties, and goods coming from the United States to the Philippines were not subject to any duty at that time.

What this legislation proposes is to retrospectively create a tax where no tax had previously existed.

These moneys, at the time the provision in question was enacted, were wrongfully in the Treasury and the right to their recovery was the property of the claimant, suit for the enforcement of which had been brought and pending some four years, and claimant's right to recover in this class of cases had by a test case been adjudicated by this court favorably to him.

Under these circumstances, Congress could not legalize and ratify the wrongful taking and holding by the United States of this claimant's property. If it could, then claimant's property could be taken without due process of law and appropriated to public use without just compensation, and the legislature could exercise the powers vested by the Constitution exclusively in the Judiciary.

In one of the earliest cases decided by this court it is said:

> "There are certain vital principles in our free *Republican governments*, which will determine and over-rule an *apparent and flagrant* abuse of legislative power; as to authorize *manifest injustice by positive law;* or to take away that security for *personal liberty*, or *private property*, for the protection whereof the government was established. An Act of the legislature (for I can not call it a law) contrary to the *great first principles* of the *social compact*, can not be considered a *rightful exercise* of legislative authority. The obligation of a law in governments established

on *express compact and republican principles*, must be determined by the *nature* of the *power*, on which it is founded. A few instances will suffice to explain what I mean. A law that punished a citizen for an *innocent* action, or, in other words, for an act, which, when done, was in violation of no existing law; a law that destroys, or impairs, the *lawful private* contracts of citizens; a law that makes a man a *judge in his own cause;* or a law that takes *property* from A. and gives it to B. It is against all reason and justice, for a people to entrust the legislature with such powers; and therefore, it can not be presumed that they have done it. The *genius*, the *nature* and the *spirit* of our State Governments, amount to a prohibition of *such acts of legislation*; and the *general principles of law and reason forbid them.* The legislature may enjoin, permit, forbid, and punish; they may declare *new* crimes; and establish rules of conduct for all its citizens in *future* cases; they may *command* what is right, and *prohibit* what is wrong; but they can not change *innocence* into *guilt;* or punish *innocence* as a *crime;* or violate the right of an antecedent *lawful private contract;* or the *right of private property.* To maintain that our Federal, or State, Legislature possesses *such* powers, if they had not been expressly restrained, would, in my opinion, be a *political heresy*, altogether inadmissible in our *free republican governments.*"

Calder v. *Bull*, 3 Dall. (U. S.) 388, 389.

Mr. Justice Harlan has said:

"It is contended that the foregoing enactments govern the present case and preclude recovery of interest upon the amount of the respective coupons from their respective maturities. In this view we do not concur. By the first section of the Act of 1868 the Legislature assumed to declare what was the true intent and meaning of the previous legislation prescribing and limiting the rate of interest. It was said by *Chancellor* Walworth, in *Salters* v. *Tobias*, 3 Paige 344, that, 'in England, where there is no constitutional limit to the powers of Parliament, a declar-

atory law forms a new rule of decision and is valid and binding upon the courts, not only as to cases which may subsequently occur but also as to pre-existing and vested rights. But even then the court will not give it a retrospective operation, so as to deprive a party of a vested right, unless the language of the law is so plain and explicit as to render it impossible to put any other construction upon it. In this country, where the legislative power is limited by written constitutions, declaratory laws, so far as they operate upon vested rights, can have no legal effect in depriving an individual of his rights, or to change the rule of construction as to preexisting laws. Courts will treat such laws with all the respect that is due to them as the expression of the opinion of the individual members of the Legislature as to what the rule of law previously was. But beyond that they can have no binding effect; and if the judge is satisfied that the legislative construction is wrong, he is bound to disregard it.' When counsel, in *Ogden* v. *Blackledge*, 2 Cranch 276, announced that, to declare what the law is or has been is a judicial power, to declare what the law shall be is legislative, and that one of the fundamental principles of all our governments is that the legislative power shall be separate from the judicial, this court interrupted with the observation that it was unnecessary to argue that point. Prior to the passage of the Act of 1868, the highest judicial tribunal of the State had adjudged that when a sum was to be paid at a specified time, as interest, that sum bore interest from that time until paid. This was an adjudication as to what was the local law *in that class of cases.* And the utmost effect to be given to a subsequent legislative declaration, as to what was the meaning of the statutes which had thus been the subject of judicial construction, would be to disregard it as an alteration of the existing law in its application as to future transactions, especially where, as was the case in the Act of 1868, that declaration was accompanied by a distinct provision, in terms, changing the preexisting law.

"In *Stockdale* v. *Ins. Co.*, 20 Wall., 331 (87 U. S., XXII, 351), this court, speaking by *Mr. Justice Miller*, said that, 'Both on principle and authority it may be taken to be true, that a legislative body may, by statute, declare the construction of previous statutes so as to bind courts in reference to all transactions occurring after the passage of the law, and may in many cases, thus furnish the rule to govern the courts in transactions that are past, provided no constitutional right of the party concerned is violated.' *Sedgwick* Stat. and Constitutional Law, 2d ed., pp. 214, 227; Cooley, Const. Lim., 93, 94. It is clear, therefore, that neither the Act of 1868, nor the provision quoted from the revision of 1872, which is but a continuation of the 2d section of the Act of 1868, can be deemed applicable to the case before us. The contract between the Town and the holders of its securities was entered into prior to these enactments, and the rights of the parties must, necessarily, be determined by the law as it was when the contract was made. It was not within the Constitutional power of the Legislature to take from the plaintiff his right, whether arising on express or implied contract, to interest upon interest, if, when the coupons were executed and delivered, he, or the then holder thereof, had such right under the law of the State."

Koshkonong v. *Burton*, 104 U. S. 668.

What is said here is directly applicable to the present case. There had been an adjudication as to what was the law in this class of cases before the attempted ratification. The plaintiff had rights arising out of an implied contract on the part of the Government to refund him these payments illegally exacted which it is not within the constitutional power of the legislature to take from him.

It seems to us too plain to require the reciting of further authorities, that the result of the act here being construed would be to take the claimant's property and give it to the United States, and to do this by a legislative fiat.

There are, however, many authorities upon this subject directly in point and from various sources which show how universally, though respectfully, the courts of the country have withstood the encroachment of the legislature upon their powers, when that encroachment has been made plain, and we will, even at the risk of being tedious, quote from some of the most pointed of these cases.

"If it was competent for the Legislature to make a void proceeding valid, then it has been done in this case. Upon this question we can not for a moment doubt or hesitate. They can no more impart a binding efficacy to a void proceeding than they can take one man's property from him and give it to another. Indeed, to do the one is to accomplish the other. By the decree, in this case, the will in question was declared void, and, consequently, if effect be given to the decree, the legacies given to those absent defendants by the will are taken from them, and given to others, according to our statutes of descents. Until the passage of the act in question, they were not bound by the verdict of the jury in this case, and it could not form the basis of a valid decree. Had the decree been rendered before the passage of the act, it would have been as competent to make that valid as it was to validate the antecedent proceedings, upon which alone the decree could rest. The want of jurisdiction over the defendants was as fatal to the one as it could be to the other. If we assume the act to be valid, then the legacies, which before belonged to the legatees, have now ceased to be theirs, and this result has been brought about by this legislative act alone. The effect of the act upon them is precisely the same as if it had declared, in direct terms, that the legacies bequeathed by this will to these defendants should not go to them, but should descend to the heirs at law of the testator, according to our law of descent. This it will not be pretended that they could do directly,

and they had no more authority to do it indirectly, by making proceedings binding upon them which were void in law."

McDaniel et al. v. *Correll et al.* 19 Ill. 227, 228.

"Nor can the Act of Assembly of April 6th, 1870, Pamph. L. 960, entitled 'An Act to validate certain proceedings in partition,' have any effect upon the title of Lewis Richards. Without pausing to inquire into the soundness of the objection which has been made to the title, as not being in accordance with the constitutional provision which requires that 'the subject shall be clearly expressed in the title' (first amendment of 1864), we hold that the act itself is unconstitutional, and void, as an infringement of the inhibition contained in the 9th Section of the declaration of rights, Art. IX, of the Constitution, that no person 'can be deprived of his life, liberty or property, unless by the judgment of his peers or the law of the land.' What is this act but a mere bald attempt to take the property of A. and give it to B.? At the date of the passage of the act, Lewis Richards had an undivided share—a fourth part of the land in question—and by the legislative fiat validating these proceedings in partition, which the law then pronounced a nullity as far as his estate was concerned, this undivided share is divested from Lewis Richards and vested in Griffin Rote, who figured as a trustee in the partition. * * * It was not a case in which the mere irregularity of a judgment or a formal defect in the acknowledgment of a deed was cured, where the equity of the party is complete and all that is wanting is legal form. Such were *Underwood* v. *Lilly*, 10 S. & R. 97; *Tate* v. *Stooltzfoos*, 16 S. & R. 35; *Satterlee* v. *Matthewson*, 16 S. & R. 191; and *Mercer* v. *Watson*, 1 Watts, 330. On the contrary, it is very clearly within the principle of *Norman* v. *Heist*, 5 W. & S. 171; *Greenough* v. *Greenough*, 1 Jones, 489; *De Chastellux* v. *Fairchild*, 3 Harris, 18; *Werges* v. *Dentler*, 9 Casey, 495; *Bagg's Appeal*, 7 Wright, 512; *Schaffer* v. *Erea*, 4 P. T. Smith,

304; *Shark* v. *Brown*, 11 P. T. Smith, 320. These cases abundantly sustain the position that an act of the Legislature can not take the property of one man and give it to another, and that when it has been attempted to be taken by a judicial proceeding, as a sheriff's sale, which is void for want of jurisdiction, it is not in the power of the Legislature to infuse life into that which is dead, to give effect to a mere nullity. That would be essentially a judicial act, to pronounce judgment—to usurp the province of the judiciary—to forestall or reverse their decision."
Richards v. *Rote*, 68 Penn. St. 255–256.

"As we have seen, the order of the Probate Court directing the sale by Forster and the sale of the 19th of September, 1853 were *void*. If prior to the enactment of April 2, 1866, the validity of the sale in question had been presented to this court, even in a collateral proceeding, we must have held, both upon reason and authority, that it transferred to the purchaser no estate in the land. Had the District and Supreme Court in fact decided the sale by Forster to be void, and the Legislature had then enacted that the judgment should be set aside, and the validity of such sale again be made the subject of judicial inquiry, the interference by the Legislature with a distinct department of the government would be palpably apparent to every mind. In every case, and the instances are few in which such a law has been passed upon by the courts of a State having a written constitution, it has been declared unconstitutional; even where there was in the written constitution no express provision prohibiting the Legislature from exercising judicial power. But had the Legislature gone one step further, and by special enactment or by general law covering the case, commanded the courts which had rendered a judgment in favor of a plaintiff, in an action based on the invalidity of the Forster sale, to set it aside and to enter a judgment for the defendant, such arbitrary attempt would, at once, have been recognized as an

abuse not to be tolerated under our free constitution of Government.

"The circumstance that the validity of this very order of sale had never been before the courts, does not make the statute (assuming that it applies to such order) any the less an effort summarily to dispose of a question purely judicial, or to deprive citizens of their property 'without due process of law.' This last expression is the equivalent of the 'law of the land'; a law which, as said by Mr. Webster in the *Dartmouth College* case, 'hears before it condemns; which proceeds upon inquiry, and renders judgment only after trial.'

"If we assume the act to have validated the Forster sale (and order of sale), then the lands which up to the date of the act—April 2, 1866—belonged to the heirs of Nathaniel M. Pryor, from that date became the property of other persons, and this transfer was accomplished by the legislative act alone. And, even if we could indulge the fiction that the parties to be deprived of their estates had notice of the intended act, and a hearing and opportunity to produce witnesses, or to show cause why the act should, not be passed, this would have been a species of trial, and the exercise of judicial power by the Legislature."

Pryor v. *Downey*, 50 Cal. 405–406.

"Could it, by statute, give vitality to the decree of a court which was absolutely lifeless and void for want of jurisdiction over the person against whom it was rendered?

"The Legislature may, by statute, validate judicial proceedings, when the statute is only in aid thereof and tends to support the same, by precluding parties from taking advantage of errors or irregularities which do not affect their *substantial rights*. But it can not, by retrospective legislation, give validity to previous judicial proceedings which were void for want of jurisdiction over the parties. Two reasons may be assigned for this inhibition: *First* because it would be an exercise of judicial power not contem-

plated by our Constitution—see Art. III; *second* because it would operate to deprive parties of their 'day in court'; property rights might be divested without notice to those interested, and without giving them the opportunity to be heard. See § 25, Bill of Rights; *Mason* v. *Eldred*, 6 Wallace, 239; Cooley on Const. Lim. § 107, and cases cited in notes. * * * If it was competent for the Legislature to make this declaration, then it was competent for it to have declared that to be a judgment which before was no judgment, and binding upon the party against whom it was rendered when before he was not bound at all; for such is the direct result. It is a proposition not to be discussed at this day, that the Legislature has no such power. *Nelson* v. *Rountree*, 23 Wis. 370; See *Pryor* v. *Downey*, 50 Cal. 403; Wade on Retroactive Laws, § 164."

Israel v. *Arthur, Adm'r, et al.* 7 Colo. 10–11.

The above cases are where the legislature attempted by retroactive language to instill life into judicial proceedings which the courts had held were void when such proceedings were had. In principle they are equally applicable to an effort of the legislature by retrospective language to instill life into executive action that the courts had already declared void at the time such action was had.

Running through all the decisions on this subject is the broad idea that *Mr. Justice Harlan* gave concrete expression to in the citation already quoted from *Koshkonong* v. *Burton*, 104 U. S. 668., *ie.*, that settlement by a court of the law applicable to a class of cases in one case is a settlement as to the whole class, and precludes the legislature from infringing upon the vested powers of the Judiciary and changing by a legislative enactment the decision of the court so as to deprive persons of property rights who are in a class where their rights had already been determined by a test case.

"On May 6, 1878, the legislature passed a statute, to take immediate effect, in these words: 'No sale thereinafter made of real estate taken for taxes shall be held invalid by reason of the notice of sale having contained the words "or such undivided portions thereof as may be necessary," or the words "or such undivided portions of them as may be necessary:"' provided, however, that this act shall not apply to any case wherein proceedings at law or in equity have been commenced involving the validity of such sale, nor to any real estate which has been alienated since the eighth day of February of the current year and before the passage of this act.' St. of 1878, c 229.

"The principal question presented and argued in each of these six cases is whether this statute is constitutional, as applied to sales, no suit involving the validity of which had been commenced before its passage, and where the real estate sold had not been alienated between February 8, 1878, and the passage of the act.

"After mature advisement and careful examination of the numerous cases cited at the bar, and giving due weight to the strong presumption in favor of the validity of every act of the legislative department, all the judges feel themselves compelled by their judicial duty to declare that the statute in question exceeds the constitutional authority of the Legislature in two important respects.

"First. The statute assumes to take away private property, without due process of law, and without compensation.

* * * * * *

"Second. The statute is an attempt to exercise judicial power by the legislature. It does not change the law for the future, nor establish a uniform rule for the past." * * *

Forster v. *Forster*, 129 Mass. Rep., 560–561.

In the decision just quoted from, the act declared unconstitutional had excepted from retrospective operation

all cases where suit had been brought, thereby recognizing the inability of the legislature to reach that class of cases, and the question was, whether the retroactive provision was applicable to cases where suit had not been brought; and the court held even as to those cases it was not applicable. Here it is attempted to legislate retroactively for cases not only in which suit has already been brought, but where it had been determined in a test case that there was a right in this class of cases to recover.

We will now refer to cases where the actions attempted to be validated had to do with the assessment or collection of taxes.

> "It must be recollected that when this case was in review before, it was decided, after solemn argument, that the defendant on the same statement of facts was not entitled to payment for the value of his improvements,— that he had no claim whatever against the plaintiff; it is now argued, that by an omnipotent legislative fiat he has a legal and constitutional right to full compensation. With every respect for that branch of the Government, we must take leave to deny that any such authority as is claimed belongs to the legislative power of the State. Thus, suppose a suit is brought by A. against B., and the court should decide that A. was entitled to nothing, would it be competent for the legislature to interfere, and by the flimsy pretext of giving a construction to a previous act on which the question may depend, on the statute of usury, for example, or to a principle of the common law, which amounts to the same thing, enable A. to recover the full amount of his claim. And yet, stripped of the specious pretenses with which the argument of the defendant's counsel is clothed, it is precisely what is attempted here. It is proposed, by the substitution of legislative will for right, to compel the plaintiff to pay for improvements, when it is clear, so far as judicial determination can make it so, he was not under an obligation, either legal or moral, to do so, before the

passage of the act. In other words, it is seriously contended that the legislature, in the plenitude of their generosity, have transferred the money of the plaintiff into the pocket of the defendant. The furthest the court has gone is in *O'Connor* v. *Warren*, 4 Watts & Serg. 223, where it is held, that until the judiciary has fixed the meaning of a doubtful law, upon which right has become vested, it may be explained by legislative enactment. But in that case it is strongly intimated, if not directly decided, that where the construction is not doubtful, particularly where it has been under judicial cognizance, no subsequent act of the legislature, whether it assumes the form of an explanatory act, or whatever shape it may take, as using the words 'it shall not be construed,' which is now the usual formula, it cannot affect or change previous rights already fixed and settled."

Lambertson et al. v. *Hogan et al.*, 2 Penna. State Rep. 25.

"It is claimed, however, that the curing act of February 28, 1873, entitled 'An act to legalize the tax-roll of the village of Mt. Clemens for the year 1872,' does away with the force of the objection.

"That act does, in terms, purport to heal all the defects which have been pointed out. But plaintiff's judgment was obtained before the justice before this act was passed. It was regular when obtained, it could not be reversed. The legislature have no authority to reverse judgments, directly or indirectly. The effect of the act must be so limited as not to interfere with an existing judgment, or it would be necessary to declare it void on principles which are too elementary to be discussed."

Moser v *White*, 29 Mich. Rep. 60.

"* * * The act of March 25, 1874, referred to in the opinion, in terms validates, ratifies, and confirms all orders and resolutions of the Board of Supervisors, in relation to improving Townsend street, and the resolution of award, and all contracts made

under said orders and resolutions, and all proceedings of said Board of Supervisors of public streets."

Reis v. *Graff*, 51 Cal. Rep. 86.

"The Board of Supervisors not having made an order for the publication of the notice of the award of the contracts, all the proceedings, including the assessment, subsequent to the award, were void. (*Donnelly* v. *Tillman*, 47 Cal., 40; *Donnelly* v. *Marks*, Id., 187). The plaintiff relies upon the act of March 25, 1874 (Stat. 1873–4, p. 589), as not only validating the assessment, but as having a retrospective operation, which necessarily affects this action. The action had been finally submitted for decision before the passage of the act.

"Assuming that the legislature may itself make the assessment, or what amounts to the same thing, validate a void assessment, does the act have the effect to make the assessment valid, by relation, as of the date of the invalidated assessment? Or does it become valid only at the date when the act takes place? The act does not furnish a new rule of evidence, nor does it merely cure irregularities or formal defects in the proceedings or the assessment; but if valid it creates a lien upon property which before the passage of the act was not chargeable with the lien, and gives the contractor and his assigns a cause of action for its enforcement. The assessment, in our opinion, if it became a lien by virtue of the act in question, became such at the date of the passage of the act, and did not take effect, by relation, as of the prior date. There being at the commencement of the action no lien in fact upon the property, and the lien created by the act not taking effect as of a prior date, the action cannot be maintained."

Opinion in *Reis* v. *Graff*, *supra*; p. 90.

The cases we will next cite are peculiarly applicable to attempts to make a law for a particular case between contesting parties contrary to the existing law.

That is what is attempted by the provision under consideration.

The law applicable to this case is the law that governed in the decision of the *Warner Barnes* case, and Congress can not issue a mandate to this court to establish a particular interpretation that will override the one the court adopted in the test suit for this class of cases.

> "But the legislature say the court shall appoint a trustee, to execute the power immediately; that is, makes a law for a particular case between two contesting parties, which rule is contrary to existing law, and orders the court to inforce it. Suppose the right of entry was barred by twenty-one years' adverse possession, and the legislature, choosing to pass a law for a particular case, should enact that A might bring his action of ejectment against B for a messuage or tenement, and in order to give judgment in favor of A, notwithstanding twenty-one years' actual adverse possession, alleging some reason not sufficient in law to prevent the statute from running. Here would be legislation for a particular case, contrary to the general law. Such legislation would, I apprehend, find few approvers, because it would be taking that which the general law made the property of one man and giving it to another. But after all, the excuse would be that they were only giving the estate to him who had the title, merely removing the impediment of the statute. In the case on hand, the legislature not only removes the legal impediment contained in the will, which prevents the executors from selling before the death of Daniel, but also annihilates the provision of the will that the executors shall rent out the land and pay the rents and profits to Daniel during his life, and takes from the sons of the testator the probable increase of the land during Daniel's life, and the privilege of taking it as land at his death. By what warrant may they do all this? Not by the power of a judicial decree, because the legislature have no judicial power. And that is not legislation which adjudicates in a

particular case, prescribes the rule contrary to the general law, and orders it to be enforced. Such power assimilates itself more closely to despotic rule than to any other attribute of Government."

Ervine's Appeal, 16 Penna. Rep., 266.

" * * * What then did the legislature propose by the statute of 1848? This court had ruled in *Asay* v. *Hoover* directly, and in *Barr* v. *Strobell*, *Cavett's Appeal*, and perhaps *Hays* v. *Harden*, incidentally, that a testator's mark to his name, at the foot of a testamentary paper, but without proof that the *name* was written by his express direction, is not a signature required by the act of 1833; and the legislature has declared, in order to overrule it, that 'every last will and testament heretofore made, or hereafter to be made, except such as may have been finally adjudicated prior to the passage of this act, to which the testator's name is subscribed by his direction, or to which the testator has made his mark or cross, shall be deemed and taken to be valid.' How this mandate to the courts, to establish a particular interpretation of a particular statute, can be taken for anything else than an exercise of judicial power in settling a question of interpretation, I know not. The judiciary had certainly recognized a legislative interpretation of a statute before it had itself acted, and consequently before a purchaser could be misled by its judgment; but he might have paid for a title on a unmistakable meaning of plain words; and for the legislature subsequently to distort or pervert it, or to enact that white meant black, or that black meant white, would, in the same degree, be an exercise of arbitrary and unconstitutional power."

Greenough v. *Greenough*, 11 Penna. State Rep., 494–495.

The following case emphasizes how important it is that, to preserve the government under which we live, we preserve the distinction the Constitution fixed between the different branches of our Government, and that from

the nature of things the only conservative power to do this is lodged with the Judiciary.

"The opinion of the court was delivered July 15, 1850, by *Gibson, C. J.* If anything is self-evident in the structure of our government, it is, that the legislature has no power to order a new trial, or to direct the court to order it, either before or after judgment. The power to order new trials is judicial; but the power of the legislature is not judicial. It is limited to the making of laws; not to the exposition or execution of them. The functions of the several parts of the government are thoroughly separated, and distinctly assigned to the principal branches it is, the legislative, the executive, and the judiciary, which, within their respective departments are equal and coordinate. Each derives its authority, mediately or immediately, from the people; and each is responsible, mediately or immediately, to the people for the exercise of it. When either shall have usurped the powers of one or both of its fellows, then will have been effected a revolution, not in the form of the government, but in its action. Then will there be a concentration of the powers of the government in a single branch of it, which, whatever may be the form of the constitution, will be a despotism—a government of unlimited, irresponsible, and arbitrary rule. It is idle to say the authority of each branch is defined and limited in the constitution, if there be not an independent power able and willing to enforce the limitations. Experience proves that it is thoughtlessly but habitually violated; and the sacrifice of individual rights is too remotely connected with the objects and contests of the masses to attract their attention.

"From its every position, it is apparent that the conservative power is lodged with the judiciary, which, in the exercise of its undoubted right is bound to meet every emergency; else causes would be decided not only by the legislature, but sometimes without hearing or evidence. The mischief has not yet come to that, for the legislature has gone

no farther than to order a rehearing on the merits; but it is not more intolerable in principle to pronounce an arbitrary judgment against a suitor, than it is injurious in practice to deprive him of a judgment; which is essentially his property, and to subject him to the vexation, risk, and expense of another contest.

"It has become the duty of the court to temporize no longer, but to resist, temperately, though firmly, any invasion of its province, whether great or small.

"We are bound to say, therefore, that *Braddee* v. *Brownfield* is not law, and that it was erroneously decided. As the act before us is null, the plaintiff ought to have been allowed to proceed on his judgment.

"Order reserved and rule to show cause discharged."

De Chastellux v. *Fairchild*, 15 Penna. State Rep., 20–21.

From Nebraska comes the following well-considered case:

"* * * But section three legalizes 'all contracts and loans made by any corporation or association already formed,' under Chaper XXV of the Revised Statutes of 1866, with any member thereof, and section four defines what 'shall be deemed in law a waiver of anything in such contract or loan that might be deemed usurious, in the same under the laws of this State, at the time the same was made and securities given.' And we are now asked to disregard the vested rights secured to defendant by virtue of the laws under which the contract was made, and to determine the rights of the parties under the act of 1873. To do so would not only give this act a retroactive operation, but it would also give effect to an expository law in which one legislature attempts to interpret the statutes written by another legislature seven years before, and thereby adjudicate upon private rights which had accrued

under the former laws. The law under which the loan was made, not only inhibited the bonus reserved by the plaintiff, but also gave the defendant the right to protect himself against the payment of such usury, and save his vested right under the law, of which the constitutional provision declares he shall not be deprived, and therefore it seems plain that this act of 1873 must be destitute of a retroactive force, not only because it is judicial, but also because it contravenes that provision of the Constitution which declares that no person shall be deprived of life, liberty, or property, without due process of law. It is well understood, as a fundamental principle of our system of government, that the making of statutory laws, and their exposition and application to cases as they arise, are clearly and distinctly two different functions; the former is allotted by the Constitution to the legislature, the latter to the courts.

"Again, the two sections referred to are not in the nature of a declaratory statute, nor are they in the nature of a curative act; but they purport to be an interpretation of former laws, and are substantially in the nature of a mandate to the courts to construe and apply the former laws, not according to judicial, but according to legislative judgment. Can a legislature exercise such judicial authority? By Art. II of the Constitution, the powers of the Government are divided into three distinct departments, 'the legislative, executive, and judicial, and no person or collection of persons, being one of its departments, shall exercise any power properly belonging to either of the others,' except as therein expressly directed or permitted. Hence the powers of the legislature are to enact laws, not to expound them; and the powers of the courts are to interpret the law, declare what it is, and apply it to cases as they arise."

Lincoln Building and Saving Association v. *Graham*, 7 Neb. Rep. 179–180.

The leading case relied upon by appellant to sustain the power of Congress to ratify the assessment and collec-

tion of these duties is *Grim* v. *Wiesenberg*, 57 Pa. St. 433. The opinion of the Court of Claims referring to this case, p. 19, Rec., says:

> "How much the necessities of war may have influenced this decision it is unnecessary to inquire, and it is sufficient to say that Judge Cooley, in his work on Taxation, refers to this case in a note and speaks of another case immediately following it as 'a more doubtful one.' (Cooley on Taxation, 515, Note I, 3d Ed.)"

Several of the strongest cases we have just cited have been Pennsylvania cases. The predicates laid down by Judge Sharswood in this case of *Grim* v. *Wiesenberg's School District*, show that the case comes entirely outside the category of the present case. For instance, he says:

> "If an act of Assembly be within the legitimate scope of legislative power it is not a valid objection that it divests vested rights."
>
> p. 48, Attorney-General's Brief.

Unfortunately, whether Judge Sharswood overlooked the legitimate scope of legislative power in the case he was deciding, or not, it is a fact that the scope of legislative power in reference to the case here for decision does not include the right to violate the Fifth Amendment to the Constitution of the United States, or Section 1, Art. 3 of the Constitution.

Judge Sharswood also says:

> "It has not been pretended and could not be, that the legislature had not the power antecedent to authorize it."
>
> pp. 48–49, Attorney-General's Brief.

In this case, while admitting the right of Congress itself to pass a tariff law for the Philippines, it is contended that Congress did not have power, antecedent to the

exaction of these duties, to authorize the President to make a tariff law for the Philippines and to say what should be the tariff rate there.

The legislation is also unconstitutional, because—

2. The right of these goods to free entry was acquired by treaty, and Congress has no power to do away with that right save by itself fixing a tariff law for the Philippines under the authority conferred upon it by the Constitution.

There is a view of the matter rendering this legislation unconstitutional, which should not be overlooked.

By the treaty which the United States made with Spain whereby the Philippines became territory of the United States, the power of the President to impose duties on goods from the United States at once ceased and the right of free entry until Congress should legislate and impose a tariff on goods from the United States began; and save by the right to itself legislate Congress had no constitutional powers to change the rights acquired by this claimant, under the treaty.

> "The title to the strip of land in controversy having been granted by the United States to the elder chief Moose Dung, by the treaty itself, and having decended upon his death, by the laws, customs, and usages of the tribe, to his eldest son and successor as chief, Moose Dung, the younger, passed by the lease executed by the latter in 1891 to the plaintiffs for the term of that lease; and their rights under that lease could not be divested by any subsequent action of the lessor or by Congress, or of the executive departments. The construction of treaties is the peculiar province of the Judiciary; and except in cases purely political, Congress has no constitutional power to

settle the rights under a treaty or to affect details already granted by the treaty itself. *Wilson* v. *Wall*, 6 Wall. 83, 89; *Reickart* v. *Felps*, 6 Wall. 160; *Smith* v *Stevens*, 10 Wall. 321, 327; *Holden* v. *Joy*, 17 Wall. 211, 247.

"The Congressional resolution of 1894 and the subsequent proceedings in the Department of the Interior must therefore be held to be of no effect upon the rights previously acquired by the plaintiffs by the lease to them from the younger chief; and the decree is affirmed."

Jones v. *Meecham*, 175 U. S. 32.

The legislation is further unconstitutional, because

3. Congress cannot ratify what in the first place it could not authorize.

When Congress fixes tariff rates and provides the necessary means for levying and collecting taxes it is legislating.

When the Executive undertakes to do the same thing, there can be no doubt but what he is likewise exercising legislative power. His act can have no other construction.

There can be no question but what the President in establishing this tariff was legislating, yet the Constitution provides:

"Art. I, Sec. 1. All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives."

"Art. I, Sec. 8. The Congress shall have power to lay and collect taxes, duties, imposts and excises—to regulate commerce with foreign nations and among the several States."

"Art. IV, Sec. 3, second paragraph. The Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States."

"One of the settled maxims in constitutional law is, that the power conferred upon the legislature to make laws cannot be delegated by that department to any other body or authority. Where the sovereign power of the State has located the authority, there it must remain; and by the constitutional agency alone the laws must be made until the constitution itself is changed. The power to whose judgment, wisdom, and patriotism this high prerogative has been entrusted cannot relieve itself of the responsibilities by chosing other agencies upon which the power shall be devolved, nor can it substitute the judgment, wisdom, and patriotism of any other body for those to which alone the people have seen fit to confide this sovereign trust."

Cooley's Constitutional Limitations (7th Ed.), 163.

The case of *Field* v. *Clark*, 143 U. S. 659, 692, referred to frequently in the briefs on these cases, lays down as vital to the integrity and maintenance of our system of government that Congress can not delegate legislative power to the President, and that the true distinction is always between delegation of power to make the law, which necessarily involves discretion as to what the law shall be and conferring merely authority or discretion as to the execution of the law enacted in the first instance by the proper legislative power.

The tariff here levied was made by executive order and fixed by executive discretion and in no other way. This is too plain for argument. There is not a semblance of the executive having merely exercised a discretion as to the execution of a law enacted in the first instance by Congress, the branch of the Government possessing the proper and exclusive power to legislate.

Unless Congress could in the first instance have delegated the power to legislate to the President it could not afterwards constitutionally ratify such legislation. Con-

gress could itself, on April 11, 1899, have legally imposed duties on goods coming from the United States to the Philippines, but because of that, there is no fiction known to the law whereby Congress could have delegated to the Executive its authority to make such a law.

Where there exists no authority to confer power, there can never be any agency. What A in the role of principal could not authorize B to do, if done by B, A can not afterwards ratify.

The Constitution has separated the powers of the legislature from those of the executive. The branch of the Government to which is given legislative power, and the branch to which is given executive power is each supreme within its sphere, but neither can invade the sphere of the other. Each has a course of its own which, if the integrity of our constitutional form of government is to be preserved, and we are to have law and order and not chaos, need to be kept as distinct and separate as the courses of the planets in the heavens.

The leading case relied on by the Government to sustain the power of Congress to ratify the action of the President in having made the law under which these duties were levied, is the case of *Hamilton* v. *Dillin*, 21 Wall. 92. The opinion of the Court of Claims (p. 20, Rec.) tersely disposes of this case as an authority where it says:

> "(1). The tax was held legal without any validating act.
>
> "And
>
> "(2). The tax was also a proper exercise of the military power of the President against an enemy in time of war."

In the case now under consideration the facts are just the reverse of those in *Hamilton* v. *Dillin*. Here

(1). The tax is illegal without any validating act.

And

(2). The tax was not a proper exercise of the military power of the President against an enemy in time of war, having been levied after the war had ended (for which the order was made).

If Congress can ratify the unconstitutional act of the President in one case, it can do so in any case; and the powers of the President become, not what the Constitution has ordained, but what the legislature may will—a condition repugnant to the fundamental principles upon which rests the Republic.

4. Before the passage of the act in question, this court had declared such a law to be unconstitutional.

In the case of *De Lima* v *Bidwell*, 182 U. S. 199, it was insisted that Congress had recognized the right to collect the duties in question by applying under the act of March 24, 1900 (31 Stat. at Large, 51) for the benefit of Porto Rico, the amount of the customs revenue received on importations by the United States from Porto Rico since the evacuation by the Spanish forces October 18, 1898, to January 1, 1900, together with any further customs revenues collected on importations from Porto Rico since January 1, 1900. But this court decided that that act could clearly have no retroactive effect as to moneys theretofore paid under protest, for which an action to recover back had already been brought; and that the right to recover moneys already sued for could not be taken away by a subsequent act of Congress; and that such action would be beyond the power of Congress.

It is the contention of the Government that the following language from *Lincoln* v. *United States*, 202 U. S. 484, reopens the question decided in *De Lima* v. *Bidwell, i. e.*:

> "The statute does not ratify all action or all collections of taxes, as it easily might have done, but

> only actions in accordance with the order. If the order, properly construed, did not purport to apply to vessels unless they were either enemy or foreign, then when a vessel ceased to be foreign the order did not apply, and a tax upon such vessel, not being in accordance with the order, is not ratified by the act. This construction is favored by the consideration that the suits had been begun when the act of July 1, 1902, was passed, and that, even if Congress could deprive plaintiffs of their vested rights in process of being asserted (*Hamilton* v. *Dillin*, 21 Wall. 73), still it is not to be presumed to do so in language which literally taken has a narrower sense."

Then referring to the case of *De Lima* v. *Bidwell*, the Court said :

> This affords a special reason for believing that if it (Congress) had intended to encounter the limitations of that case it would have done so in clear words from which there was no escape."

In taking this view, counsel seem to have forgotten that it is the duty of the court to give some meaning to a statute if it can and that the language above quoted was used in a discussion by the court of this duty and in setting forth the meaning that properly belonged to the clause, *i. e.*, that it ratified certain action Congress had the right to ratify, but did not ratify as was contended by the Government, the levying of these duties.

It is both incumbent and appropriate in considering the language now used to pass upon the power of Congress to ratify and we feel assured that with all due respect for the legislative branch of the Government, this court will not hesitate to decide that Congress has exceeded its legislative functions, just as it decided in passing upon the Porto Rican case in *De Lima* v. *Bidwell*.

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